Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

PAULA REISKIN, and J.T. THOMAS,

Petitioners,

vs.

DEPARTMENT OF WATER SUPPLY/MAUI COUNTY, E.H. TANNER, COUNTY OF MAUI, a municipal corporation, and JOHN AND JANE DOES 1-100, CORPORATE; PARTNERSHIP, BUSINESS AND ASSOCIATE DOES 1-100,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii/ Intermediate Court Of Appeals Of Hawaii (ICA)

PETITION FOR A WRIT OF CERTIORARI

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92 P12

QUESTIONS PRESENTED

1. Is it a violation of the U.S. Constitution's 14th and 1st Amendments', (infra) clauses for due process and equal protection and right to petition for grievances, for a State to dismiss the Petitioner's claims for mental damages, at the Respondent's government's requested expedited hearings on matters not noticed, not motioned for, not calendared and not even mentioned, there? And, can this dismissal be based on the alleged conduct of another person who was not even mentioned nor motioned for, nor calendared, nor noticed for at the dismissal hearing?

2. Is it also a said violation, to have the government Respondents introduce at that said hearing a letter unnoticed (which was against the trial court's standing order,) (infra) from the government Respondents' psychologist and to have the trial court deny the Petitioners (Reiskin and her attorney Thomas may be referred to as Petitioner/s henceforth) request for an evidentiary hearing, to bring in the psychologist, as his letter was contra to the written prior findings of the court in the case, and yet have this letter become the basis of the said dismissal?

3. Is it a said violation to so dismiss, when there was not an order issued that was ever disobeyed or concerned the basis of the dismissal, especially when the court dismissed because Reiskin showed for an exam at 1 PM and stayed 4 hours, which was exactly as ordered by the court and as the Respondents requested?

QUESTIONS PRESENTED – Continued

4. Is it a said violation of the above clauses and of the right against self incrimination and the right to have an attorney present during questioning, per the 5th and 6th Amendments to the U.S. Constitution to force mentally damaged Reiskin (infra) into a government psychiatrist's exam alone, to answer questions about an unrelated pending felony matter, to be used in her prosecution?

5. Is it a said violation of the said 14th and 1st Amendments Clauses to so dismiss, when Reiskin consented to all exams and went there alone and fully cooperated, especially when the Respondents refused to obey the court order in this matter, based on a desired immunity from all suit for intentional, negligent and reckless harm to be done to Reiskin?

6. Is it an abovesaid violation, to so dismiss on matters, without giving any inclination of what the trial court was basing its dismissal on, in specifics?

7. Is it an abovesaid violation, to ignore newly created evidence, after the said dismissal that contradicted irrefutably any basis of the dismissal and showed that the government Respondents presented an undeniable fraud on the Court in obtaining the dismissal?

8. Is it an abovesaid violation for the Court to Rule 11 HRCP sanction (Rule 11 HRCP is exactly the same as Rule 11 FRCP,) on a Rule 60 (1)(2)(3) and 59 (E) HRCP Motion, based on the newly created evidence of smoking gun admissions by the government Respondents, contra to the dismissal, and to so sanction on matters, not in the said motion by the Petitioners, and on matters not requested

QUESTIONS PRESENTED – Continued

by the Respondents, while the trial Court refused the Petitioners' request for time to give a written reply to the Rule 11 request, as it was served at the last minute, thus barring any reply time?

9. Is it an abovesaid violation for the State Appeal Court to let the said Rule 11 sanction for that Motion, stand based on it being totally frivolous and for an improper purpose, when the same Appeal Court adopted the Petitioners' argument word for word, in that Motion and reversed the trial Court and vacated the dismissal on the physical damages of Reiskin and remanded it for trial, as the Petitioners had argued for in that Motion?

10. Is it an abovesaid violation for the State Appeal Court not to look at the Petitioners' key evidence submitted in the hearing/below on appeal that was properly entered and referred to in Petitioners' timely Memorandum below, and in the record, and that was attached as an exhibit and that was properly before the Appeal Court, as an appendix in the Opening Brief and in the record on appeal and that was properly described and argued from and cited to in the Opening Brief, also?

11. Can the sanction imposed by the Hawaii Intermediate Court of Appeals (ICA) stand when it is based on Thomas' attaching a tape as App. 38 to his Opening Brief (OB), per the ICA opinion's FN 10-7, that ruled that the tape was not part of the appeal, when contrary to that ruling and the ICA's October 6, 1993 order, (App. 8, at its page 2), the index in the record for appeal at its page 70 cites this tape as in the said record, at R6505, as did the

QUESTIONS PRESENTED – Continued

trial judge on the record below, and as did the filings below, that refer to it by its exhibit number and description there, and as did the Opening Brief so refer to it there thrice, giving its Appendix number and cite in the record for appeal and its description?

12. Can this ICA sanction stand when it violates due process, equal protection and access to the courts, as it has no specifics nor did it allow for a chance to oppose it, when it was made on July 30, 1993 and when it is void for vagueness and for selective enforcement, as applied or as potentially applied, in comparison to the government Respondents' Brief?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vi

OPINION BELOW 1

JURISDICTION 1

I. STATEMENT OF THE CASE 1

II. LEGAL ARGUMENT 23

III. CONCLUSION 29

Appendices 1 through 15 ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Crissy by Feliz Medley v. Mississippi Dept. Public Welfare (1991) 780 F. Supp. 1104 (D.Ct. S.D. Miss.) 25

Gentile v. State Bar of Nevada (1991) 111 S.Ct. 2720, 115 L.Ed 2d 888 ..... 24, 29

In Re Murchinson (1959) 349 U.S. 133, 99 L.Ed. 580 29

In Re Ruffalo (1988) 390 U.S. 544, 88 S.Ct. 1222 25

Keating v. Keating (1958) 43 Haw. 51 26

Oliveri v. Thompson (1986) 803 F.2d 1265 (2nd Cir.) cert. denied 107 S.Ct. 1373, 94 L.Ed. 2d 689 (1987) 26

Pacific Mutual Life Ins. Co. v. Haslip (1991) 111 S.Ct. 1032, 113 L.Ed. 11 24

Priviteria v. Calif. Bd. of Medical Quality Assurance (1991) 926 F.2d 890 (9th Cir. 1991) 25

Schlogenhauf v. Holder (1964) 379 U.S. 104 26

Simmons v. Dickhart (1986) 804 F.2d 182 (1st Cir.) 25

Tom Growney Equip. v. Shelly IRR Development (1987) 834 F.2d 833 (9th Cir.) 27

Townsend v. Holman Consulting Corp. (1989) 881 F.2d 788 (9th Cir) 27

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

United States Constitution

First Amendment 1, 23

Fifth Amendment 1, 2, 4, 23

Sixth Amendment 1, 2, 4, 23

Fourteen Amendment 1, 23

STATUTES AND RULES

Hawaii Rules of Appellate Procedure

Rule 10(B)(3) 20

Rule 28(B) 19

Rule 28(C) 19

Hawaii Revised Statutes

Section 641-1(A) .....

Hawaii Rules of Civil Procedure

Rule 6A and D 5

Rule 11 ..... 8, 16, 21, 27

Rule 26(E)(1)(2) 6

Rule 35(A) 8

Rule 35(B)(1) 4

Rule 37(B)(2)(C) 5

TABLE OF AUTHORITIES – Continued

Page

Rule 59(E) 7, 19, 26

Rule 60B(1)(2)(3)(6) 7, 13, 19, 23, 26

Title 28 United States Code

Section 1257(A) 1

OPINION BELOW

The 7/30/93 opinion of the ICA was given then & our Supreme Court denied on 9/14 & 10/22/93 certiorari & these decisions were unpublished. App./s 5, 6, 8.

JURISDICTION

28 U.S.C. 1257 (A) gives jurisdiction here. The date for the entry of the judgment to be reviewed is 12/21/93. App. 10. The 4 trial Court orders appealed from were on 6/25/91, 3/18, 4/6, & 4/21/92. App. 1-4. The 1st, 5th, 6th, & 14th Amend/s to the U.S. Constitution were violated as *for* meaningful access to the courts, against self incrimination, assistance of counsel, due process & equal protection here. App. 11.

I. STATEMENT OF THE CASE

Reiskin filed suit against the Respondents on 12/27/89 (R. (record or appeal) 2 & 3A). On 6/5/90, the judge ruled that no support material by Reiskin may be introduced at any hearing without 48 hours notice (R7456-57) in mundane unexpedited hearing motions, & at other hearings on 5/16/91 etc., but he allowed the Respondents to violate this. Reiskin was a suicidal paranoid schizophrenic. On 6/19/90 the Respondents filed for a hearing to have a mental exam by a psychiatrist & Reiskin filed an opp. memo stating that she had a right to have Thomas present, which had 17 cites with it, & she won. On 6/15 & 11/28/90, the Respondents filed requests to have themselves declared immune for any harm they may do to Reiskin, which were denied. (R7188, 7255-60, 7456-57, 7199-7204, 7252-54, 7389, 7409-10, 7412, 7421, 7378-89, 7263-64, 7279-80). On 12/13/90, Reiskin volunteered that she would be examined by psychologist Merrill. The judge ordered the exam be done by Merrill only & that it not exceed 4 hours (R7294-7298). Reiskin went to that exam timely & fully cooperated & had a 17

hour day from off isle, for it & the Respondents drafted the order that said that the exam was to be done only by Merrill & limited to 4 hrs. Reiskin taped that exam, answered all 1000 questions politely & stayed the 4 hrs., even though the Respondents switched the examiner. On 11/28/90, the judge granted an order to shield the Respondents' wit/s' file, which contained penal matters; protecting the said 5th and 6th Amend. rights (R7205-7247, 7300, 7302, 7311, 7179, 7454-55, TR2595-p.2). The Respondents on 3/7/91 asked confidentially what Thomas thought of an unrelated felony done by Reiskin before Thomas knew her. Thomas said that she probably did it. On 3/11/91 the Respondents wrote 2 letters wherein they admitted breaking the confidentiality & that they sought further admissions & about reporting the matter to the police & they tried to dismiss the case, based on this and set some depositions to dig up more on it. They distorted Thomas' words, there & on 5/20/91 the Respondents told Thomas' wife that they were going to report Reiskin for that prosecution. In a 3/15/91 depo., the Respondents instructed their wit. not to answer based on the said 5th & 6th Amendments (R7191-92, 7328-37, 6496, 6577-78, 7365-73). On 3/22/91, the judge ordered for the 1st & only time, to have an exam by psychiatrist Eliashof. Reiskin filed 2 timely opp. memos to this & cited to 30 jurisdictions, that held that she had a right to have Thomas there, even without giving notice & that the burden was on the defense in this. Neither in filings nor at the hearing, did the judge or the Respondents, object to Thomas being at the exam. The judge ordered the Respondents to set & notice the exam at any reasonable time prior to 4/30/91. The Respondents asked for a trial continuance then & the Petitioners had never asked for one until the 5/28/91 hearing, & the court said that it would move the 6/10/91 trial. At a 4/3/91 hearing, the judge told the Respondents again to set the exam before 4/30/91. On 4/3/91, Dr. Jones swore in depo. that Eliashof would do anything for the Respondents. On

4/15/91, the Respondents filed a document stating that they must comply with the order of 3/22/91. On 4/16 & 4/30/91, Thomas gave to the Respondents letters telling them to set Eliashof's exam by 4/30/91 (R7375-84, 7386, 7392-98, 7403-10, 7425-26-27). Thomas wrote the Respondents on 5/2 & 5/3/91 stating that they missed the judge's said deadline of 4/30/91, & cc:ed this to the Judge again. On 4/28/91, Reiskin heard the repo :s from friends of the "60 Minutes" show that stated that Hawaiian Airlines was going to have imminent crashes, per gov't officials & its mechanics. Reiskin's letter of 4/28/91 was given to the Respondents on 4/29/91 at 8:40 AM asking them to switch the 4/30/91, 10 AM flight from Hawaiian Air to Aloha Air for her 2nd exam at Merrill's because of this. The news had stories on 4/29/91 about a 100 people who cancelled that day on Hawaiian because of that show; 7 times the normal rate & that the stock dropped 12% in a panic. Reiskin wrote that she would go to Merrill's at any possible time & asked the Respondents to be prompt. At 8:10 AM on 4/30/91, the Respondents responded to the 4/28/91 letter, saying that they would arrange the Aloha flight. They were told that Reiskin lived 1 hour, per the taxi, from the Aloha airport & that Aloha required 20 minutes check in, & they called back at 9:05 and said they had a 9:55 flight. Reiskin asked the Respondents for later flights & was refused. Reiskin called Merrill & got the next appointment & paid $156 for it to be on 5/21/91. (R7431-38, 7189-90, 7657-58, 7482-83).

On 4/26/91, the Respondents again filed for a trial continuance & at a 5/16/91 hearing, said that the "*only* issue in this case is the psychological data". On 5/21/91, the Respondents filed to move Merrill's exam to 5/23/91 at 1 PM, because he hurt himself, which was granted on 5/22/91. On 5/20/91, the Respondents listed 10 depos. that they set after 5/29/92. The Respondents sent a 5/22/91 reminder that this exam was at 1 PM & they requested another trial continuance. On 5/25/91, John

Pedro wrote that when he went to serve a subpoena on Eliashof, he had the police come, as he mistook Pedro for a former examinee.

On 5/23/91, Reiskin showed up at Eliashof's timely, at 8:30 and filled out his forms that said that he was a neutral & that the Petitioners would not get a copy of his exam. This violated Rule 35(B)(1) HRCP, & the order (R7456, 7459, 7461, 7473-77, 7480-88; App. 12, 6546, TR2583 p.9 L/s 1-3, OB, App. 38, R6491-92). Thomas asked Eliashof if he was going to ask questions about Reiskin's felony for prosecution. He refused to answer. Thomas was polite & taped the conversations. This tape was quoted & attached at Exh. B to the Petitioner's Opp. Memo to the dismissal hearing for 5/28/91. Thomas said he must be present during the felony questioning & that Reiskin would cooperate except on that. Only Eliashof brought up (per the tape) again about being sued if he intentionally, etc., hurt Reiskin & that there was nothing else to discuss & he refused, the exam even with her alone & cooperative. Thomas had checked with the ex-prosecutor Jos. Cardoza, who said that it would be mal-practice for him not to be there then. Eliashof called the Respondents, & Thomas requested a hearing on the record. Thomas put on that 5/23/91 transcript, that he told Eliashof that the Petitioners would fully cooperate in the exam. Thomas stated there that the Respondents were going to get admissions for prosecutions as the main issue. Reiskin's psychiatrist/psychologist wrote that Reiskin could not protect her 5th & 6th Amend. rights there. Eliashof wrote a letter saying that no one threatened him. Petitioners stated that there would be a claim only if Eliashof intentionally hurt Reiskin. Thomas waived twice any civil damages against Eliashof for doing the exam. For the 1st time there at that hearing, the judge ordered that Thomas not be present. Thomas gave there an unconditional yes to this. The judge asked the Respondents at that hearing if the Eliashof exam was going into criminal matters. *The Respondents never answered this question.*

Thomas left after Eliashof said that was all, as not to trespass. The Respondents refused to let Eliashof do the exam (R6503-05, 7191, 7657-58, 7517-18, 7365-73, 7179, 7454-55, 6571, 6546, 7520 L's 1-2, 17-18, 7321-24, 7319, L's 7-8). The Respondents set an expedited 5/28/91 dismissal hearing: Hawaii Rules of Civil Procedure (HRCP) 6A & D. App. 12. The Respondents noticed, & motioned for, & had calendared to have only the psychiatric Eliashof exam to be addressed at that hearing & no sanctions or mention of Thomas ever existed for that hearing, as Thomas pointed out in filings & at that hearing.

At that hearing, despite Thomas' objections, matters about a psychological exam at Merrill's on 1/9/91, were presented along with a later psychological exam & report by Merrill, along with a flight rescheduling of Merrill's exam matter, & matters about another mental exam. The judge based his dismissal sanction on these, against Thomas & allowed the Respondents to intro/serve for the 1st time a letter by Merrill, there, that said that Reiskin showed for her exam at 1 PM instead of noon, & that she left an exam after 4 hrs. (yet the judge had ordered 1 PM & the 4 hours limit at the Respondents' request & no one said otherwise). There Thomas brought out the noticeable cases of 7 local doctors, & psychiatrists, who were recently convicted/charged with molestation during exams & one had made the referral to his neighbor, Eliashof (R6335, 6501, 7544, 7537, 7514, 7538-40, 6496, 7187-88, 6557-61, 6572-74). Reiskin submitted letters describing the proper conduct at the exams. Thomas was never at Merrill's nor did he see him. Thomas' affidavit stated that Merrill told him that he told Reiskin to leave the exam. She wrote that she would return alone & cooperate anytime, anywhere for an exam with anyone at her expense. The Petitioners' filings said that there was no order that they broke, per Rule 37(B)(2)(C) HRCP. The Respondents broke the orders. The Parties asked that the hearing/s be evidentiary as to Merrill which was denied. The Respondents at the hearing lied about the flights and

the alleged *noon time*. The judge ruled that the only issue was the *psychiatric exam* (R6546, 6603, 6590-93, 7547, 7550-L.14, TR2583, p.6-L's 16-17, R7550-51-L's 2-9, 7551, 6503-05, 7205, 7221, 7247, 7535, 7553, 7455 & App. 13). At a 5/28/91 depo. the Respondents admitted using profanity and attempted to get criminal admissions on a wit. in order to get him out of the case (R7572-86). On 5/29/91, the judge gave the dismissal (R7596) on matters not motioned for, calendared or noticed & that were not even mentioned at the hearing despite the Petitioners following all the orders while the Respondents refused to do so. Eliashof's, Reiskin's & Thomas' affid. & tape showed that no one threatened Eliashof for doing an exam. The judge incorrectly ruled that Eliashof's exam was granted on 5/16/91, instead of 3/22/91, & that he had not been informed of the intent to have Thomas there, yet Reiskin had memos with 30 cites, at that 3/22/91 hearing, stating that intent yet the judge wrote, with no facts, no dates, no times, no years, no names, no places, & no specifics, that Thomas was disingenuous, intimidating, belligerent & inappropriate. The judge refused to reset the trial. The Respondents were 48 times untimely & defiant in their past filings, & the Petitioners never were so (R7572-86, 7596, 7602, 7471-72, 7313-24). Neither the judge, the ICA nor the Respondents, ever pointed to any order that was violated.

After the dismissal, the Respondents presented a bill that revealed that they paid $300 for a 6/29/90 rept./consult. from a psychiatrist on Reiskin's condition for exams. Yet, on 11/13/90, the Respondents were asked in interrog. #22, for the basis of the opinion of any expert consulted & without objection said none existed. Rule 26(e)(1)(2) HRCP, required disclosure of this. On 6/3/91, Gabriel Gandall heard Merrill say that Reiskin ans'd. all the questions at the exams, & that he left the exam, & had said that he could not see her any more & to leave as he had another patient; & had a cold. On 5/29/91, Merrill said that Reiskin could come back for an exam anytime.

On 6/4/91 & 6/14/91, the orders (drafted by the Respondents) were signed which stated that Reiskin was to be at Merrill's exam at 1 PM yet the dismissal was based on a "noon" invention (R7303, 7498-99, 7261-62, 6702-03, 6733-34, App. 12, R7607-08, 7189, 6591-92, 6603, 6622-24, 6646-47). On 6/24/91, the Respondents filed a bill showing that Eliashof was paid $3,984.51, for the 3 hours exam that he refused to do alone on Reiskin because he wanted immunity, for intentional harm, etc.; he charges $400 per reg. hour. On 3/9/92, based on newly-created evidence, Thomas filed a motion to vacate the dismissal per Rule 60B(1)(2)(3) HRCP & for a findings of fact (FOF) & conclusions of law (COL) for himself. That was denied & signed on 3/18/92. The motion was based on fraud, mistake, inadvertence, inexcusable neglect, surprise, misrep., misconduct, etc. Reiskin changed her schizophrenic mind & asked to file a similar motion. That was denied on 4/3/92, and the order was filed on 4/6/92. On 4/4/92, Thomas received an admissions "smoking gun" letter from the Respondents' atty. that was just written (R7620-21, 7679, 7102-16, 7557-71, 7688, 7671-72, 7693, App. 13 OB App. 53). Based on this letter, which was contrary to the Dismissal's Ratio Decidendi, Reiskin made a Rule 59(e) & Rule 60(b)(1)(2)(3) HRCP motion on 4/7/92, & for FOF & COL. App. 13. In that letter, the Respondents' atty. stated that he was trying to depose a M. Elliott, who was the owner of the firm where Reiskin committed an unrelated felony. Respondents said there that this 4/91 set depo., involved the felony & was a very significant issue in the case, contrary to their prior statements. It also stated that it wanted Eliashof's input. It stated that Thomas was involved in this felony, even though that was impossible because Elliott & Reiskin submitted to the Respondents that the felony happened before Reiskin knew Thomas. No money was ever received or requested by Thomas (App. 13 R7693-7701). All of the above fraud, misrep. & surprise revelations rebutted the basis of the dismissal & the motion was

heard on 4/21/92 & denied. The Respondents filed an opp. memo to that motion that asked for Rule 11 HRCP sanctions, which was served approx. 48 hrs. before the hearing. Thomas had no time to respond to this, but requested for a motion for these sanctions & a hearing. This was denied & that judge refused to accept any filing by the Petitioners w/o 48 hrs. notice. The judge said that this motion was for an improper purpose & all frivolous (App. 12, TR2601, R7731-33).

The filings for appeal were timely filed. The Respondents did not ever contest any of the facts stated above. The Motion to Dismiss which was heard on 5/28/91, motioned for, calendared, & noticed only 1 issue; which read:

> "As a result of the persistent refusal of *Plaintiff* to participate in a *psychiatric* examination as ordered by the Court, this action should be dismissed". (emphasis added) (R6535)

The only psychiatric exam ever ordered by the judge was per Rule 35(A) HRCP for 1 with psychiatrist Eliashof on 5/23/91 at 9 AM. App. 12. Reiskin fully complied. The Petitioners timely filed in their Opp/Memo for that, which read in 2 places:

> "The court on this expedited but serious motion has given only notice that the **only thing* this Plaintiff can address is the May 23, 1991 Eliashof exam and no other matter in the Court's decision has been *noticed* to Plaintiffs." (emphasis added) (R6501-02 pp.14 & 15)

The said Rule for an exam, states that an "order" is required for an exam & that it shall specify its "manner & conditions & scope". The signed dismissal order for the dismissal (App. 1) stated that it was ordered on 3/22/91 & that Reiskin was to submit to an exam by psychiatrist Eliashof (App. 1-p.2 A-D). Contrary to the dismissal's para. 1(b), on 12/13/90, the judge ruled:

"The Court: . . . *not to exceed four**, that seems reasonable Mr. ___."
"Mr. Thomas: All right." (emphasis added)
TR2397, p.12

The Respondents stated then that it "shall not exceed four hours." 3 times, Reiskin's doctor said she couldn't endure more. (R7246-L14, 7300, 7302 para. 4, 7294, 7288-89, 7225, 7327, 7205-7246, 6688, 7183 para. 4, TR2582, p.13-L's 1-4.) Contrary to the dismissal's para/s. 1(d) & 3(b), Thomas provided promptly, the date for the exams to occur before 4/30/91, & Reiskin was phoneless & on a different island then. This issue of the 4/30/91 deadline, was *not mentioned* or alluded to at or for the dismissal hearing. (TR2582). The dismissal stated that there was a 5/21/91 exam set at Merrill's, per its para. 3(2). Merrill cancelled this as he hurt himself & this was not motioned for nor mentioned at the dismissal hearing. The dismissal's para. 3(b)(i) stated that Reiskin did not attend an exam on 4/29/91. There *never was set, mentioned or ordered any 4/29/91 exam.* This was not motioned or noticed or mentioned for or at the dismissal hearing. The dismissal's para. 3(b)(iii) said that Thomas told the Respondents to fly a kite. This is false & the only mention of it was by the Respondents' atty., who earlier wrote that he doesn't mean what he says. Thomas & his wife's submission refute that this fly a kite statement was made, & this matter was not mentioned or motioned for, etc. at/for the dismissal hearing. The dismissal's para. 5, stated that Thomas had said that Eliashof would be sued for the exam. The uncontested tape of that conversation & the record totally refute this unspecified charge.

Eliashof never mentioned waiting & he was not on the phone, per the tape. The dismissal's para. 7, said the judge received Merrill's letter at the 5/28/91 expedited hearing unnoticed; that said that Reiskin had left her 2nd exam before it was done, while refusing an evid. hearing

or anytime to reply. The Merrill exam was not motioned for, calendared, nor noticed for then. The judge ignored at a post judgment hearing, an affid. by Mr. Gandall (App. 15) that said that he heard Merrill refute this letter as did Thomas' affid. & Reiskin's letter. The dismissal's para. 8 said that Reiskin's affidavit said that she flew a commuter plane, contrary to her fears, to the 5/23/91 exam because she spent the taxi fare, allegedly causing delay. Reiskin spent the said taxi money unbeknownst to Thomas, to eat on, despite being warned by his 5/17/91 letter not to, but she was timely at the exams. The Respondents wrote that they still owed for her car damage, which exceeded that fare. The Respondents agreed to the airline switch. The judge refused after 3 requests to say where in the entire record of 8,000 pages, over the years that Thomas was disingenuous, etc. (R7438, 6603 last para. TR2578, R4652-62, dismissal's para. 9-10). The Petitioners gave notice that was unobjected to, of Thomas being at the exam and won on this on 6/19/90 (R7438, 6603 last para. TR2578, R4652-62, R6518).

In the said 3/22/91 memos for Thomas' presence, Reiskin put in that her "attorney must be present if wished for in a psychiatric exam" & that notice is not required & that the burden is on the Respondents & repeated this there 30 times, with 25 in & out of state case cites (R7438, 6603 last para. TR2578, 4652-62, 6518, 6520-22, 7188, 6525, 6528-31, 6533, 6535). The judge made a written finding that there was no contumacious conduct & initialed it per the Respondents drafted order. App. 1, Para. 9. The judge ruled that the dismissal was based solely on "Plaintiff and her counsel's refusal to permit a psychiatric exam". App. 1, Para 12. There was only 1 such exam ever ordered which was with Eliashof at 9 AM on 5/23/93, which the Petitioners obeyed. On 5/21/91, the Respondents filed a motion for an exam with Merrill &

asked it be *"at 1:00 p.m."* 4 times & at the hearing & it was granted (emphasis added) (R7474).

Yet the dismissal was based on Reiskin showing at 1 PM per Merrill's unnoticed letter. App. 1, para. 12, R7474-75, 7482, R6621, 6647, 7610, TR2582-L's 10-11, TR2583, p.4-L3, p.6-L24: And that, "She was an hour late – this reduced the time that Merrill had available for a formal interview" (TR2583, p.6-L2). This was impossible, supra. At the hearing, the noon/& 4 hr. basis was objected to:

> MR. THOMAS: "Maybe we could bring Dr. Merrill in here: I'm sure he won't dispute that."

The Respondents acquiesced to this (TR2583, p.5-L's 16-17, TR2852, p.14-L's 12-15). The ICA wrongfully said that there was no request for an evid. hearing. App. 5. On 3/22/91, the judge ordered:

> "The Court: I will order that those examinations take place at any reasonable time prior to the end of April, April 30th. Defendants may notice those." (R7384, p.3-L's 25 & 1 & 2).

On 4/3/91, the court again reminded the Respondents to so set. (R7392 L's 15-18). On 4/15/91, the Respondents filed that they would set those exams by 4/30/91, but never did (R7425). On 4/16/91, Thomas delivered a letter to the Respondents that said that they were to set Eliashof's exam by 4/30/91, which they never did (R7427, 2nd para.). On 4/30/91, Thomas delivered another letter to the Respondents & cc:ed it to the judge which said that that day was the last day to set Eliashof's exam; which they did not (R7436, 1st para.). On 5/2/91 & 5/3/91, Thomas delivered other letters to the Respondents and cc:ed them to the judge which said that they had not set Eliashof's exam as ordered (R7441, 7443, 2nd para.). On 5/3/91 the Respondents' atty. called Thomas while he was at home for the 1st time for the setting of Eliashof's exam for 5/9/91. On 3/12/91, Thomas had written that

atty. & told him to put all communication in writing because of his lying & vulgarity (R7228-39). On 5/22/91, the Respondents told Thomas' wife that he was going to turn Reiskin over for prosecution (R7228-39, 6496-1st para., 6577-78.) When the Respondents' atty. & Dr. were asked on 5/23/91 about asking Reiskin about any crimes at the exam, they refused to answer (TR2580, p.5, L's 5-8).

The transcript of the taped exam at Eliashof's (OB App. 38, R6503) showed the Petitioners politely talking & that Thomas would only be there to speak if Reiskin is asked about the felony (OB 38, R6503). The judge then ordered, on 5/23/91, for her to go with Eliashof alone & answer all about that felony & the Petitioners agreed. The tape states:

> "J.T. THOMAS: I'm here with Dr. Eliashof and I told him I wouldn't be present in the exam and we'd go through with it, but he has declined. I'm in his office now at almost 10, about 9:45. Is that correct doctor?
> DOCTOR: Partly.
> J.T. THOMAS: Okay **anything incorrect?*
> DOCTOR: Well, what you didn't put in was that, ah, your threats to sue me *if* she's *damaged*, have made the circumstances of this evaluation impossible and too difficult for me to be able to . . .
> J.T. THOMAS: Okay.
> DOCTOR: . . . examine her. I can't examine a patient objectively when her attorney is saying he's going to sue me *if* she's *hurt by it.*
> J.T. THOMAS: Well that's our right, that's our right to sue anybody that's hurt our client. But anyway, and we've brought this up several times in Court, and she would cooperate, she wouldn't interfere and I would stay out of it. But, if that's the way you feel doctor, that's the way you feel. Thank you."

This shows that Eliashof would be not sued for doing the exam. See also Eliashof's letter saying this (R6375). Thomas, at the 5/23/91 hearing, twice said that the Petitioners waived all damages from Eliashof doing the exam (R6511-L.1-2, 6512-L.21-22.) On 5/23/91, the Respondents refused the order for Eliashof to do the exam on Reiskin alone while she ans'd. all (R6511, L.17-18). The Respondents submitted a claim against Thomas for over $22,000.00 for costs after the dismissal (R7620). Gandall's affid. of 6/3/91 was submitted for a Rule 60(b) Motion. No other date earlier than 5/31/91 past the dismissal, is referred to there. Yet, *the ICA refused to consider it as it said that it was dated 5/28/91; which is impossible* (R7620). The Petitioners submitted 822 pages of irrefutable evidence in Rules 60B and 59E, FOF & COL motions (R7661-66, 7672-7680, 7689-7709, 7117-7165, 6664-6927, 7181-7659). ON 4/21/91, THE JUDGE IGNORED THIS & ON MATTERS OUTSIDE THE FILINGS SANCTIONED BECAUSE OF THE SAID MOTION. YET THE **ARGUMENT IN THAT MOTION, WAS ADOPTED EXACTLY* BY THE ICA & USED TO REVERSE THE JUDGE'S *DISMISSAL OF PHYSICAL DAMAGES CLAIMS!!*

In that 4/7/91 Motion that Thomas was sanctioned on, its page 5 (R7696) reads:

> "Most importantly, the Court threw out Plaintiff's back injury claims that had nothing to do with any exam and that had admissible and virtually uncontested $9,000 in medical bills."

The ICA adopted that argument exactly & reversed the judge & remanded it for trial on the plaintiff's back injury claims. (App. 5, pp. 2, 9, 11, 12, 13, FN 11 at p. 13 p. 15.) Yet the ICA let the sanction stand as all "frivolous & for an improper purpose". The judge sanctioned without giving *Thomas time to file an opposition to the 11th-hour sanction request* (App. 14). The FOF & COL were denied there. At the hearing, Rule 60 (B)(1),(2),(3) grounds were

shown against the dismissal by a new smoking gun admission. At the 5/16 & 5/23/91 hearings, the Respondents and judge had said:

> "Now the big issue in this case, really the *only issue* in this case is the psychological data". (emphasis added) (R7645, 7661, L's 15-16)
>
> "The cornerstone of the case is **not anything to do* with *felony charges*" . . . "The cornerstone of the case is the minor accident did not *cause psychological damage* to this woman." (emphasis added) (R7516, #'s 4, 5, 7, 8)
>
> "I don't frankly see any criminal exposure or liability." (R7692-93, 7516, 7521, L.23-24; Judge speaking).

The new 4/4/92 letter showed that the Respondents were going to use the said exam to get felony admissions for prosecution; contra to the judge's dismissal basis, who said on 5/23/91:

> "There's been no showing whatever that her fifth amendment rights are really involved here." (R6684 p.8 L's 1-2; Judge speaking).

On 5/28/91, speaking about the felony, TR2582, p. 9, L. 23-24 & p.10, L.11-20, & p.11, L's 16-17 reads:

> The Court: "Has there ever been any indication that the psychiatrist would ask her about that?"
>
> The Court: "So you're saying Dr. Eliashof was in on the conspiracy to ask your client questions which would incriminate her?"
>
> The Court: "You have nothing to indicate that they are going to do this."
>
> The Court: "Wasn't there a specific order in this case?" (R2582, p. 9 L's 23-24, p. 10 L's 11-20, p. 11 L's 16-17)

There never was an order to go alone to the exam & answer all questions, until 5/23/91 when the Petitioners

put on the record an unconditional yes to this. But the Respondents refused to obey. (TR2578, TR2583, p. 2, L.24, and p. 6, L.18 and 19, p. 7, L.19-21, p. 8, L.1-11). In that 4/4/92 smoking gun, the Respondents referred to the felony of Reiskin *with bold typed references* to it & about their trying to depose Mr. Elliott in April of 1991, who was the owner/employee of the firm against whom the felony was committed. This letter said in parts:

> "I believed at the time, and still believe, that Mr. Thomas intentionally sought to obstruct this deposition of this former employee of the adjustment firm which paid a fraudulent claim presented by his client. I believe the adjustment records obtained in *Reiskin* demonstrate that the check for the fraudulently claimed transportation expenses was sent to Mr. Thomas. Please have your office regarding Mr. Thomas and *Reiskin* together with Mr. Thomas' responses and interview Ms. Connie De Bord, who was the person identified in the claim as having provided the transportation and has taken an affidavit demonstrating the falsity of the claim. I believe these records, when compared with Mr. Thomas' responses to my complaint to your office, demonstrate Mr. Thomas has continued to try to conceal his participation in what was patently a fraudulent insurance claim. Since I expected to examine the witness about this conversation eventually, as the obstruction of discovery by Mr. Thomas, which eventually lead to dismissal of *Reiskin*, was by this time a *significant issue* in the case." (emphasis added) (R7699-7700)

The Respondents falsely said before that they were not pursuing prosecution. Reiskin showed at the exam for protection with Thomas & the judge dismissed therefore. The felony happened before Thomas knew Reiskin, but

the Respondents wanted to prosecute him anyway (R7697-98). The judge Rule 11 sanctioned, without any FOF or COL, as to why the letter which was received only 1 day after the 4/3/92 hearing which went to the essence of the misrep., fraud, etc. & which was the basis of the dismissal, etc., was for an improper purpose & frivolous (TR2601, p. 11, L.10-23, R7731-32).

Thomas requested a hearing on the Rule 11 sanction as the Respondents put it in their opp. memo & the Petitioners did not have the 48 hours notice time to file any response to it, as this was forbidden by this judge as to the Petitioners only. The judge Rule 11 sanctioned on *matters outside the hearing filings, before him, contra to the Rule and on matters not requested.* The judge based the Rule 11 fine on 2 prior hearings' filings, where Rule 11 requests against Thomas were denied which meant that these were not violations there as the judge *"shall"* impose Rule 11 sanctions if there are violations, Rule 11 states. The Rule 11 fine was based on matters not requested by the Respondents (TR2601, p. 11 L.4-8, R7719, 7255-60, TR2601 p. 2 L's 15-24, p. 3 L's 16-24, p. 4 L's 13-14, p. 7 L's 9-16, p. 12 L's 13-19, App. 12, R7719-27, TR2601).

*The ICA refused to listen to the Petitioners' proper evidence & sanctioned Thomas falsely, saying *that it was not cited in the record.* *The 7/30 & 10/6/92 ICA rulings & 10/6/92 order, p. 2, App. 8 stated:

> "Appendix 38 is a tape of a conversation that is not part of the record on appeal. Rule 28(b)(9).
>
> "In addition to the above explanation, Thomas' response includes a portion of the transcript of a May 29, 1991 hearing below. The purpose of the inclusion is to rebut this court's statement in item No. 7 of footnote 10 that the copy of the tape that was attached to the opening brief as an appendix was not a part of the record on appeal.

> The inclusion quotes the lower court as saying, "It's [the tape] is in the record."
>
> Notwithstanding the lower court's statement, *the index to the record on appeal does not indicate the tape is part of the record, and the opening brief did not indicate where in the record that tape was introduced in evidence or could be found.* The fact that the tape may be somewhere in the record on appeal *did not justify* attaching a copy of the tape to the *opening brief without referring this court to where the tape could be found in the record."* (Emphasis added) App. 5, p. 7, FN 10-7. App. 8 p. 2.

The ICA *refused* to hear the *keypin of the Petitioners' entire case.* *The tape was part of the record & referred to and described in the *index to the record* (p. 70, Exhibits A-U, R6488-6579, exactly at R6505, Exh. B) & in the *Opening Brief (OB) 3 times* & put in the record, on appeal by no. & description there & at the dismissal hearings 6 times, & in the timely Memo in Opp. to the dismissal (Index p. 70, exhibits A-U. R6488-6579, esp. 6505, exh. B, TR2583 p. 5 L's 3-7, R6489 p. 2, TR2582 p. 4 L.14-21, p. 5 L.8-10, p. 8 L.16-17, p. 9 L.10-12, p. 11 L.2-3, p. 12-13).

Section 641-1(A) of the Hawaii Revised Statutes (HRS) required the ICA to listen to that tape (App. 14) but they did not. In the dismissal filings by Thomas, we find:

"Enclosed is a tape, Exhibit B of those talks". The O.B. at pp. 4 & 24 read:

> "Appellants taped the talks and were polite and soft spoken . . . R6503-05."
>
> "Thomas and Plaintiff are polite and low tone per *the tape App. 38."* (emphasis added)

The 7/30/93 & 10/6/93 ICA fining of Thomas was falsely based on the tape not being in the record and referred to, yet it was. This tape showed that the Petitioners were polite with Eliashof & that Thomas' presence

was needed because Eliashof was going to ask questions about an unrelated felony for prosecution, which was not denied. The tape showed that after the judge for the 1st time, said for Thomas not to be present in the exam, that the Petitioners agreed unconditionally & that it was Eliashof who brought it up again, about a suit if he hurt Reiskin intentionally, etc., & that Eliashof said there that there was nothing else to say & that he refused to do the ordered exam.

The ICA 7/30/93 opinion stated that the Petitioners were uncooperative & disruptive at a 3/22/91 hearing yet the transcript of that hearing shows not a hint of that. App. 5, p. 5 FN6, TR2578. That ICA 7/30/93 opinion at p. 14 stated that Gandall's affid. was of a conversation he heard before the 5/28/91 dismissal.

Gandall's affid. is attached as App. 15 & there he swore that the said conversation occurred only on 5/31/91 (after the dismissal hearing). The ICA's 7/30/93 opinion's p. 13 said that a 3/31/92 dated letter showed the Office of Disciplinary Counsel (ODC) was investigating Thomas. That 3/31/92 letter indicated the ODC was investigating a complaint against the Respondents' attorney only. (OB App. 53). The ICA 7/30/92 opinion said the dismissal was based on "contumacious conduct". The judge in its filed dismissal order of 6/25/91 wrote that there was no contumacious conduct. App. 5, p. 8, App. 1. The ICA 7/30/93 opinion sanctioned *Thomas without a hearing & any input from him.*

The O.B. was filed on 6/29/92, after the Appeal Court denied the Petitioners' Motion to file an oversized brief. The ICA never sanctioned the government's Respondents' Answering Brief (AB), yet on 5/21/92, the Respondents filed a Motion to Dismiss All Appeals, etc., that our highest court denied on 6/16/92. The Respondents filed their AB on 9/1/92 using the exact 11 issues/

arguments that they used in their denied Motion To Dismiss The Appeals. This is required sanctioning in Hawaii; AB, pp. 2-8, pp. 11-12, para/s. S&T, p. 29, pp. 23-26, para/s. C,D,E,F,G,H, I, p. 27, para. H, & Reply Brief (RB) App. 6-8. The Petitioners filed 4 opp. memos to that Motion To Dismiss All Appeals. The AB is governed by Rule 28 (C) of the Hawaii Rules of Appellate Procedure (HRAP) which makes it comply with 28(B) HRAP except for the points segment. App. 14. The AB's p. 14, #1, states a question that was denied, in that Motion to Dismiss All Appeals. The AB's Jurisdiction Section cited law that had nothing to do with Jurisdiction. The AB's pages 2-8 in the case's facts is argument, which was not mentioned/or noticed in the dismissal below & it refers to the Respondents' prior denied motions. The AB's Standard of Review cites 2 cases that have nothing to do with Review. The AB's p. 15, #7 p. 22 said that the 4/21/92 Motion was only a 60(B)(6) HRCP Motion, when it was a Rules 60(B)(1)(2)(3) and 59(e) Motion & that argument was denied 3 mos. before by our highest court here. (R7689-7709). The AB's p. 15, #8 said that the motion heard on 4/21/92 was "repetitive" when it was based on a new 4/4/92 letter (R7689-7709). The AB's p. 19 said that Reiskin left her 1st exam after 4 hrs., but omitted that the judge's order & their letters & drafted orders, said to do this (TR2586 p. 12, L.22-25 & p. 6 L.14, R7300-02 para. 4). The AB's p. 18 said that Reiskin failed to attend her 2nd Merrill exam, yet she went there timely, alone, ans'd all the questions, & left when told. (R6603, R6650, 7431-34, 7190, 7475, 7437-38). The AB's p. 19 stated that Thomas didn't set appointments by the ordered date, when Thomas did so & even paid for one & arranged several flights for it, & gave letters on 4/16, 4/30, 5/2, & 5/31/91, to the Respondents telling them of the deadlines which they ignored (TR2578 p. 3 L.25, p. 4 L.12, R7382

L.15-18, R7425, R7427, 2nd para., R7436, 1st para., R7441, & 7443). The AB stated that the Petitioners disrupted the 5/23/91 appointment; yet the Petitioners were polite and non-threatening; per the said tape. The AB's pp. 18 and 20, stated that Reiskin failed to show at her 4/29/91 exam. Never was there a 4/29/91 exam ever set or mentioned. TR2578, p. 3 L.25, p. 4 L.12, R7382 L's 15-18, R7425, 7427 2nd para., R7436 1st para., R7441, 7443, 6503, 6506-17, TR2580, p. 5 L's 7-8, p. 6 L's 1-2 17-18, p. 7 L's 21-22, p. 9 L's 1-2, p. 10 L.25, OB App. 38, R6650, 7431-34, 7190, 7475, 7437-38, 6603. The AB's p. 21, listed 8 hearings as proof of the Petitioners delaying. Two of those hearings were continuation requests by the Respondents, whose witness was sick & who had forgotten to prepare. The 12/13/90 hearing mentioned there, was requested by the Petitioners to enter a stip. on liab. The 5/23/91 hearing mentioned there was where the Petitioners said they would obey the order there & did but the Respondents refused. The 5/16/91 hearing mentioned there, was because the Respondents did not obey the deadlines ordered on 3/22 & 4/3/91. The 5/28 & 5/29/91 dates were the dismissal proceedings. The AB's p. 27, Sect. H, stated that Thomas did not comply with 10(b)(3) HRAP, in requesting transcripts. Our high Court rejected that argument on 6/16/92, supra: The 18 transcripts, in the Record on Appeal showed that all these were timely requested by Thomas (TR2586, R2578, 4780-4828, TR2581, TR2582-83, R6620-21, 6646-47, OB App. 38, 6617-19, 7172, 7685, 7734). The AB's p. 28 said that the Petitioners' motion had 120 exhibits against doctors, etc. Petitioners won that motion not to let their doctor examine Reiskin alone. The women wit/s for that motion included a doctor who stated that the Respondents' psychiatrist molested witnesses during his examinations. The doctor refused to come to court since 1 of the women produced

his apology letter (R7192-95, 7312-15, 7324). The AB's p. 29 said that all the "new evidence" was created before 5/30/91. The dismissal occurred on 5/29/91 (R7192-95, 7312-15, 7324, 7607-08). Yet, Gandall's affid. was dated 6/3/91 & only referred to a 5/31/92 conversation that contradicted the basis of the dismissal. The AB also omitted to say that Eliashof was paid $3984.58 not to do the 3 hrs. exam but is paid $400 an hour regularly, per their bill filed after the dismissal & that their psychiatrist gave a hidden report for $300 on 6/29/90 about Reiskin's tolerance, despite having on 11/13/91, sworn that a report did not exist, & they never denied this hidden report, in the appeal. The AB didn't mention that the 6/4 & 6/14/91 dismissal orders stated that the said exam was set for 1 PM not noon, which was the false basis for the dismissal. The AB's pp. 30-33 argued that the Rule 11 Sanction was because no new evid. existed, but our high Court had denied this argument earlier. The AB's p. 29 made the same argument that was denied before by our Supreme Court at p. 9 of their Mot/Dismiss Appeal.

The ICA gave its 7/30/92 opinion in the most generalized & unspecified terms, which stated that the OB's Jurisdiction Sect. contained argument (App. 5) but this was less than in the AB. The ICA said that the OB had "immaterial facts" & argument not supported by the record. The OB cited the record 502 times, with 14 cites per page, with 55 tabbed exhibits. The ICA said that the OB failed to quote challenged findings & conclusions in their entirety (which is not so) & is "difficult" to understand and not in "*most general* terms possible" & that there were not "enough" legal cites, yet said that there was not enough facts; & its FN5 said that no questions of fact were raised (yet 41 questions of fact were raised, that the AB did not dispute) R7607-08, 7494-95, RB p. 3 #18, OB 21-25, RB p. 6 #32, OB App. 50, App. 5, RB pp. 2-6).

These "most general terms possible" & "immaterial", or not "enough" facts or law or "difficult to understand", terms never say how, where, or what, they are talking about. None of the above facts were ever contested by the Respondents. The 6/25/91 written Dismissal Order mentioned matters as its basis that were not even raised, calendared, motioned for, nor noticed in the filings, or at the 5/28/91 dismissal hearing; it was *impossible* to object before. But, the Petitioners made the Fed. Constitutional objections below about deprivation of due process/equal protection violations. The Hawaii courts ignored without commenting on all of the raised Fed. Constitutional objections.

See the Petitioners' 5/28/91 Opp./Memo to the dismissal:

> " . . . it would be highly dangerous to Ms. Reiskin's 5th and 6th Amendment rights against self incrimination with the lack of having an attorney present . . . " . . . Plaintiff had due process rights, too." " . . . it cannot deprive Plaintiff of a right to a trial . . . " TR2582 p. 6 L/S 9-11, p. 8 L/S 21-22, p. 10 L/S 3-4 & 5, p. 10 L/S 4 & 5, p. 18, L/S 19-20).

On 3/9/92, Thomas filed timely his Rule 60(b) motion & for FOF & COL which raised the Fed. due process/eq. protect., & said 5th & 6th Amend/s rights violations again. R6674-76, 6479, 6482, & his timely Supp. Memo there raised these again & of his stake in the case (R7119, 7122). On 4/1/92, Reiskin filed timely a Rule 60(b) FOF, COL Motion raising these Fed. Constitutional violations (R7678). On 4/7/92, the Petitioners filed a timely Rule 60(1)(2)(3) & 59(e), FOF & COL Motion which raised these said Fed. Const'l. violations (R7690-99). At the hearings on 3/17 & 4/21/92 now appealed, the Petitioners raised these said Fed. Constitutional violations in

specifics again. TR2584 pp. 2-3, L's 24-25, 105, TR2601 p. 9 L/S 1-2, p. 11 L/S 4-5,8, pp. 12-13, L/S 24-25, & 1-4.

On 4/1/92 the Petitioners filed a Rule 60(b)(1)(2)(3) HRCP FOF, COL Motion & raised the same 1st, 5th, 6th & 14th Amend/s violations, supra. The Petitioners raised the lack of hearing, the denial of time to reply in writing, to the last minute sanction request & the lack of notice, per the 14th Amend, etc., in the filings for & at the 4/3 & 4/21/92 hearings, now appealed (R7661-63, TR2601, pp. 11,13).

The O.B.'s pp. 1, 10, 14, 19, 20, 25, 27-29, 34-35 & the RB's pp. 3 & 9 raised the said Amendment Clauses violations.

The Petitioners' Cert. Applications to the Hawaii Supreme Court raised the said Amend/s violations & the ICA's said 1st & 14th Amend/s violations by sanctioning Thomas for putting his key evid. into the O.B. & the ICA's baseless refusal to look at this; & for the ICA's selective enforcement & vague standard & for the ICA's false on the face basis for it.

II. LEGAL ARGUMENT

The Due Process/Equal Protection Clauses, Right for Redress of Grievances to the Government (Court) Clause, the Right Against Self Incrimination Clause & the Right to have an Attorney-Clause of the 14th, 1st, 5th & 6th U.S. Constitutional Amendments, respectively, are fully set out in App. 11. The said 14th Amend. clauses require meaningful notice/opportunity to be heard, fairness, non capriciousness, non vagueness, non arbitrariness & non potential for discrimination & specifics. The redress Clause is bound up in the Due Process/Equal protection & requires that proper evidence be looked at. The said 5th & 6th Amendment rights are self explanatory here.

Gentile v. State Bar of Nevada, 111 S.Ct. 2720, at 2724 and 2732, 115 L.Ed. 888 (1991) requires specific/articulated facts, notice & opportunity to be heard, per due process. *Pacific Mutual Life Ins. Co., v. Haslip*, 111 S.Ct. 1032, 1058, 113 L.Ed. 11 (1991).

1. To Order A /Dismissal As A Sanction, In A Written Order, Based On Matters *Not Even Mentioned At* the Respondents Requested Expedited Dismissal Hearing, & That Were Not Calendared For, Nor Noticed For There, Nor Motioned For There & That Were Against Thomas Who Was Not In The Motion, Defies The Said 1st and 14th Amend. Clauses, Supra.

2. Allowing The Gov't. Respondents To Introduce Unnoticed At That Hearing, Their Agent's Absurd Letter That Became The Basis Of The Dismissal; While The Letter Dealt With Matters & Person/s Not Noticed, Not Calendared For & Not Motioned For, & While The *Court Forbade The Petitioners From Submitting Any Filings Less Than 48 Hours Before Any Hearing*, & While The Court Refused Requests For A Testimonial Hearing, Is Another Said Violation, Supra.

3. The Dismissal's Written Order Was Based Upon Reiskin Showing At A 5/23/91 Exam At Psychologist Merrill's (This Was Not In The Motion, Noticed or Calendared For) At 1 PM Instead Of Noon, Yet All The Court's Orders, Said 1 PM As Did The Respondents' Letters, Drafted Orders, Itinerary Letter, Argument, Filings, & No One Ever Mentioned Or Wrote, Noon, Supra. Another Said Violation.

4. The Dismissal Was Based On Reiskin Leaving A Psychologist's Exam After 4 Hrs., When The Court Ordered, Unchangedly For Her To Leave 4 Hrs., Per The Respondents Demand, Supra. Another Said Violation. This matter was also not motioned or noticed at the said Dismissal hearing.

Priviteria v. Calif. Bd. of Medical Quality Assurance, 926 F.2d 890, 894, (9th Cir. 1991) Puts This As Government/ Court Discrimination Against A Party.

5. The Dismissal Was, For The Petitioners Agreeing On The Record, Twice, To Have Reiskin Go Unconditionally To Fully Do An Exam, With Eliashof Alone & Not To Sue Him For Doing It, When The Court Ordered Reiskin To Do This For The First & Only Time, The Respondents Refused It Because Eliashof Might Not Have Immunity From Any Harm He May Do To Her, Supra. Another Violation.

6. The Dismissal/Sanction Was Allegedly Because Thomas Was "Disingenuous" In Alerting About Any Intent To Appear At Eliashof's Exam, For Reiskin's 5th Amend. Rights, That The Respondents Were Planning To Violate. *Yet, At The 3/22/91 Hearing Where The Judge Only Ordered The Eliashof Exam, Thomas Filed 2 Timely Memorandae,* *That Stated 30 Times With Cites, Of Reiskin's Intent & Right To Have Thomas Present Then,* & That The Burden Was On The Respondents To Overcome This & That Notice Was Not Required. Neither The Judge Nor The Respondents Objected To This. The Judge Refused, (After 3 Requests), To Cite Anywhere In The Record Where Thomas Was Disingenuous, Intimidating, Inappropriate, Or Belligerent, As The Dismissal Said, Was Its Basis. *In Re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222,1223,1226, (1988), Deplored This Type Of Proceeding/Ruling As Violative Of The 1st & 14th Amend/s Said Clauses.

Simons v. Dickhart, 804 F.2d 182, 183 (1st Cir. 1986) At 575. *Crissy. by Feliz Medley v. Mississippi Dept. of Public Welfare*, 780 F.Supp. 1104, 1120 (D.Ct. S.D. Miss. 1991)

7. The Dismissal Was Falsely Based On The Petitioners Not Setting An Exam, Yet The Judge Ordered The Respondents To So Set This & When The Petitioners

Wrote The Respondents 4 Times To So Set Anytime Before Their Deadline, They Refused. Another Violation, Supra.

8. Having A Dismissal Because Reiskin Asked To Fly Another Airlines (to an exam) 2 Days Before The Flight Because Of A National & Government Expose' On The Unsafeness Of The Airline Chosen, Also Is A Said Violation; Since That Matter Was Not Noticed For The Dismissal Hearing & Because The Respondents Agreed To So Switch Airlines, But Did Not Do So Until 30 Minutes Before Boarding, While Knowing That The New Airlines, Was 1 Hour From Reiskin's Home, supra.

9a. Since Reiskin Paid $156 For The Exam, & Did Attend it & Other Exams & Did Answer All 1,000 Questions There, & Did Travel From Off Island For 17 Hour Days & Did File That She Would Pay For Exams And Go Anytime, Anywhere For Them Alone & Answer All There, Even Against Her Doctors Advice, Makes The Dismissal Violative Of The Said Clauses, Supra. *Schlogenhauf v. Holder* 379 U.S. 104, 117-118 (1964).

9b. *Thomas Has A Stake In The Sanctioning Against Him. Townsend v. Holman Consulting Corp.*, 881 F.2d 788 (9th Cir. 1989) At 709 FN1. *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2nd Cir. 1986) Cert. Denied 107 S.Ct. 1373, 94 L.Ed. 2d 689 (1987). *Keating v. Keating*, 43 Haw. (Federal) 51 At 51 & 52 (1958) Ruled That An Attorney Aggrieved By An Order Has Standing To Appeal. Thomas In Writing, Instructed Reiskin To Fully Cooperate & Spend Money Given For A Taxi, For It. Thomas Was Never In The Exam Rooms & Had His Office/Home 4 Islands (200 Miles) Away. Yet, He Was Sanctioned With Dismissal, For Her Alleged Exam Conduct, Of Which He & This Matter Was Not Even Noticed For The Dismissal Hearing, & The Dismissal Basis Was Not Mentioned At The Said Hearing.

10. Thomas Was Sanctioned On 4/21/93 For His Rule 60(b)(1)(2)(3) & 59(e) HRCP Motion After Newly Created

Evid. Appeared After A 4/3/92 Hearing & On Matters Not In The Request For The Sanction, In The Opp/Memo: While Thomas Was Denied A Request For Time To Respond In Writing To The Sanction, Or To Have A Hearing, As The Rule 11 Supplication Was Served Just Before The 48 Hours Deadline For Filings Before A Hearing, That The Judge Imposed On Thomas Only. Also, The Sanctioning Was Based On Matters Not In The Filings Before The Court. Another said Violation, supra.

Tom Growney Equip. v. Shelly IRR Development, 834 F.2d (9th Cir.) At 836 (1987) Held That Attorneys Were To Be Given Procedural Rights To Ensure An Opportunity To Prepare A Defense To Such Sanctioning.

11. The New Evid. Was A 4/4/92 Letter By The Respondents Showing That They Were Using The Examinations To Get Admissions To Prosecute Reiskin On, Contrary To The Dismissal Basis. Another Violation, Supra.

12. The 4/7/92 Motion That Thomas Was Rule 11 Sanctioned On Made The Foremost, Reasoned Argument That The Physical Damages Of Reiskin Could Not Be Dismissed On. And The ICA Agreed With This Exactly & Reversed/Remanded The Case For Trial On These Physical Damages & Adopted In Total, Thomas' Argument There, Yet It let Stand The Rule 11 Sanction, Supra. Another Said Violation.

Townsend v. Holman Consulting Corp., Supra, Stated At 794-95 That It Was Contrary To Stare Decisis & Illogical To Hold A Pleading Frivolous, If It States A Colorable Claim; Afortiori, Supra. Another Violation.

13. The ICA *Refused To Listen To The Key* Evid. Of The Petitioners In The appeal, At 1st, Saying That It Was Not In The Record; And When Confronted, It Said That It Was Not Mentioned In The O.B., Nor In The Record Index; Yet It *Was & Cited To 4 Times There, In Detail*, Supra. The Key Tape Was The Conversation Between The Petitioners &

Eliashof & It Showed, Contrary To The Dismissal, That Eliashof Gave The Impression That He Was Going To Ask Reiskin About Her Unrelated Felony For Prosecution In The Exam. It Showed That The Petitioners Were Always Polite, & Non Threatening, & That It Was Eliashof Only Who Brought Up Again Being Sued If He Hurt Reiskin (Intentionally, Etc.) & That Eliashof Indicated There That There Was Nothing Left To Say; Our Law, Section 641-1 (A) H.R.S. Made The Appeal A Right. App.13 Another said Violation.

14. The ICA *Sanctioned Thomas* For *Putting That Tape In The OB*, Saying That It Was Not In Record On Appeal, & When Confronted, The ICA Said So What & That It Was Not Cited Above. Yet It Was, And Described 4 Times In The O.B. & *Attached To It & In The Index For The Record On Appeal*, Supra. Another Violation.

15. The ICA Sanctioned Thomas Baselessly Without A Hearing Or Notice: Saying That Only General Conclusions Were In His O.B. Which Were "Not In The *Most General Terms Possible*," & That It Was "Difficult To Understand" & That It "Did Not Adequately Explain Why Challenged Findings & Conclusions Are In Error" & That It "Does Not Contain Sufficient Supporting Authorities" & "Had Facts Not Supported By Citations To The Record."

The "most general terms possible," can always be shortened. These generalities without notice or any specifics are on the face violative of due process. The 35-page O. B., quoted the rulings below in their pertinent entirety & had 55 tabbed exhibits & cited to the Record on Appeal 502 times/14 cites per page, & cited 9 on point cases, & scores of laws & rules & it was 35 pages long. Other courts can not be cited much, in this case, as they do not have such absurd rulings.

The gov't's unsanctioned AB contained 11 issues denied by our Supreme Court before. The AB had page/s in its Statement of the Case, with no reference to the record for support. The AB's said statement was argument & 90% consisted of irrelevant misportrayal of issues or facts not in the Record on Appeal. The OB's facts were "material" & contradicted, with 41 counter facts to the so called "facts" raised by the dismissal. The O.B. stated the Review and Jurisdiction Issues, properly; unlike the AB.

Gentile, supra, forbids even possible selective enforcement. And at its 2722 it reads:

> "Given the Rules grammatical structure & the absence of clarifying interpretations by the state court, the rule fails to provide a fair notice to those whom it is directed and is so imprecise that discriminatory enforcement is a real possibility. Both "general" and "elaboration" are classic terms of degree which in their context have no settled usage or tradition of interpretations in a law and thus a lawyer has no principle for determining when the remarks pass from the permissible to the forbidden."

In Re Murchinson, 349 U.S. 133, at 136, 99 L.Ed. 580 (1959)

III. CONCLUSION

The moral of this case, is that a person who is rear ended in her car by a local government truck, while stopped at a stop sign, in Hawaii, in an uncontested liability case, and who is injured, better not try to get any of the said U.S. Constitutional guaranteed rights to a trial for damage compensation in Hawaii, if she or her attorney are unfavored by the government: Kafkaesque, Orwellian and Third World.

A Writ of Certiorari to the Hawaii Supreme Court or ICA should be issued.

Respectfully,

March 18, 1994

J.T. Thomas
P.O. Box 576
Hilo, Hawaii 96721
(808) 969-6688

Attorney for Petitioners

APPENDIX 1

DEPARTMENT OF THE CORPORATION COUNSEL 205

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JOHN J. BREEN 5022
GUY P. D. ARCHER 1430
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Wailuku, Maui, Hawaii 96793
Telephone No. 243-7740
181. Civil. In

Attorneys for Defendants
DEPARTMENT OF WATER SUPPLY/MAUI
COUNTY and COUNTY OF MAUI

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

PAULA REISKIN, Plaintiff, vs. DEPARTMENT OF WATER SUPPLY/MAUI COUNTY, et al., Defendants.	CIVIL NO. 89-0633(1) (MOTOR VEHICLE TORT) ORDER GRANTING DEFENDANTS' SECOND MOTION FOR SANCTION OF DISMISSAL WITH PREJUDICE (Filed June 25, 1991)

ORDER GRANTING DEFENDANTS' SECOND MOTION FOR SANCTION OF DISMISSAL WITH PREJUDICE

This matter having come before the Honorable E. John McConnell on May 29, 1991, with Deputy Corporation Counsel John J. Breen and Guy P. D. Archer

appearing on behalf of Defendants Department of Water Supply/Maui County and County of Maui, and Jack L. Thomas, Esq. appearing on behalf of Plaintiff Paula Reiskin, and the Court having reviewed Defendants' Second Motion for Sanction of Dismissal with Prejudice, as well as memoranda of counsel, affidavits, exhibits and arguments thereon;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that:

Defendants' Second Motion for Sanction of Dismissal with Prejudice is granted, pursuant to Hawaii Rules of Civil Procedure 37(b)(2)(C).

In support of this Order, this Court relies upon the following facts of Record:

1) On March 22, 1991, after a full hearing, and after the issue of Plaintiff's mental, psychological and psychiatric condition had many times come before this Court since June of 1990, this Court ordered:

a) Plaintiff to submit to physical and mental examination by Dr. Byron Eliashof, M.D.;

b) Plaintiff to complete the testing and examination by Dr. Thomas S. Merrill, Ph.D., which had previously been ordered but was only partially completed due to Plaintiff's unilateral withdrawal from the examination;

c) That there be no time limitation imposed upon the doctors for the completion of such examinations;

d) That Plaintiff's counsel provide Defendants with dates for said examinations to occur by April 30, 1991, in light of his claim that he could not reach Plaintiff

in time for the examinations set forth in Defendants' motion.

2. The March 22, 1991 Order was not complied with and the matters came back before this Court on May 16, 1991, without the examinations and testing having been completed.

3. On May 16, 1991, this Court:

a) Ordered Plaintiff to:

(1) Complete the examination by Dr. Byron Eliashof, M.D., on May 23, 1991 at 9:00 A.M.;

(2) Complete the testing and examination by Dr. Thomas S. Merrill, Ph.D. on May 21, 1991 at noon;

(3) Fully cooperate in both such examinations.

b) Expressed to Plaintiff's counsel its displeasure with:

(i) Plaintiff's failure to attend the April 29, 1991 examination scheduled with Dr. Merrill due to a claimed inability to fly a particular airline and commuter planes;

(ii) Plaintiff's counsel's refusal to provide a time for examination by Dr. Eliashof before completion of Dr. Merrill's examination and testing;

(iii) Plaintiff's counsel's telling defense counsel to "go fly a kite" when attempts were made to reschedule one of the examinations.

c) Warned Plaintiff that any failure to fully cooperate with the examinations would result in dismissal.

4. On May 22, 1991 this Court, after further hearing and motion, ordered Dr. Merrill's examination and testing continued to the afternoon of May 23, 1991, due to the injury of Dr. Merrill making the prior date unavailable.

5) On May 23, 1991, this Court held a record telephone conference with both counsel at which time it appeared that Plaintiff's counsel was present in the office of Dr. Eliashof and had sought to accompany the Plaintiff into the psychiatrist's examination and told the Doctor that the examination would damage his client and that the doctor would be sued for this damage if the examination went forward. The Court then ordered:

a) Plaintiff's counsel not participate in the examination.

b) Defendants' counsel be given an opportunity to discuss with the doctor whether the examination could be completed in light of this Court Order.

c) Plaintiff's counsel was not to appear in the office of Dr. Merrill for the afternoon examination and testing.

6. On May 24, 1991, this Court reviewed the notarized letter of Dr. Eliashof demonstrating that Plaintiff's counsel continued to say that the doctor would be sued for damaging his client if the examination went forward and that Plaintiff and her counsel left the office while the doctor was on the phone with defense counsel discussing whether the doctor would be willing to conduct the examination under the circumstances.

7. On May 28, 1991, this Court received a copy of a facsimile transmittal from Dr. Merrill indicating the Plaintiff had left his office before completing the examination.

8. On May 29, 1991, Plaintiff submitted an affidavit in which she admitted she flew a commuter plane to the May 23, 1991 examination, because she had previously spent the taxi fare provided by the Defendants. These funds had been provided due to Plaintiff's claimed inability to fly such planes which had contributed to the delay and difficulties in having these examinations completed.

9. That Plaintiff's counsel's arguments concerning notice of his intention to appear at the examinations are disingenuous in light of the entire record in this case.

10. Throughout this matter the conduct of Plaintiff's counsel throughout this matter has been inappropriate, belligerent, intimidating ~~and contumacious~~ EJM as is amply demonstrated in the entire record.

11. That there is no lesser sanction that would be appropriate under all the circumstances of this case.

12. That this sanction was necessary in light of the persistent refusal of Plaintiff and her counsel to permit psychiatric examination critical to Defendants' due process rights, to prepare a defense to the claims presented by Plaintiff.

DATED at Wailuku, Maui, Hawaii, Jun 25 1991.

/s/ E. John McConnell
JUDGE OF THE ABOVE-
ENTITLED COURT
[SEAL]

APPROVED AS TO FORM:

/s/ _____
JACK T. THOMAS
Attorney for Plaintiff
PAULA REISKIN
Date: _____

PAULA REISKIN vs.DEPARTMENT OF WATER SUPPLY/MAUI COUNTY, et al.; Civil No. 89-0633(1); ORDER GRANTING DEFENDANTS' SECOND MOTION FOR SANCTION OF DISMISSAL WITH PREJUDICE

APPENDIX 2

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT
STATE OF HAWAII

PAULA REISKIN, Plaintiff, vs. DEPARTMENT OF WATER SUPPLY/ MAUI COUNTY, et. al. Defendants	CIVIL NO. 89-0633(1) ORDER DENYING MOTION TO REMOVE DEROGATORY WORDS AND SANCTION AGAINST MOVANT BY THIS COURT; OR FINE MOVANT AND/OR HOLD HIM IN CONTEMPT IF NOT ALL THE FACTS AND LAW HAVE NOT CONTRADICTED SAID FALSE DEROGATION AND SANCTION; AND FOR A SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW OF COURT'S BASIS FOR EACH DEROGATION AND SANCTION; AND FOR MOVANT TO INTERVENE AS RPI AND FOR JOINDER HERE; FOR CERTIFICATION FOR APPEAL/AS FINAL OR FOR INTERLOCUTORY APPEAL (Filed March 18, 1992)

ORDER DENYING MOTION TO REMOVE DEROGATORY WORDS AND SANCTION AGAINST MOVANT BY THIS COURT; OR TO FINE MOVANT AND/OR HOLD HIM IN CONTEMPT IF NOT ALL THE FACTS AND LAW HAVE NOT CONTRADICTED SAID FALSE DEROGATION AND SANCTION; AND FOR A SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW OF COURT'S BASIS FOR EACH DEROGATION AND SANCTION; AND FOR MOVANT TO INTERVENE AS RPI AND FOR JOINDER HERE; FOR CERTIFICATION FOR APPEAL/AS FINAL OR FOR INTERLOCUTORY APPEAL

The above-entitled motion having been filed on March 9, 1992, and having come on for hearing on

Tuesday, March 17, 1992, before the Honorable E. John McConnell; J. T. Thomas, Esq., Movant, present in Court; Guy P. D. Archer, Esq., appearing on behalf of the Department of Water Supply; and the Court having considered the arguments of counsel, the memoranda and record herein and being fully advised on the premises;

IT IS HEREBY ORDERED that the motion be denied.

DATED: Wailuku, Maui, Hawaii, Mar 18, 1992.

/s/ E. John McConnell
Judge of the
above-entitled Court
[SEAL]

I hereby certify that a copy
hereof was served upon
the following on Mar 18 1992:

J. T. Thomas, Esq.
Guy P. D. Archer, Esq.

/s/ Janice Asakura
Clerk

APPENDIX 3

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT STATE OF HAWAII

PAULA REISKIN, Plaintiff, vs. DEPARTMENT OF WATER SUPPLY/ MAUI COUNTY, et. al. Defendants	) CIVIL NO. 89-0633(1)) ORDER DENYING MOTION TO VACATE DISMISSAL AND DEROGATORY WORDS AND SANCTIONS BY THE COURT AND FOR A SPECIFIC FINDINGS OF FACTS & CONCLUSIONS OF LAW OF COURT'S BASIS FOR DISMISSAL OF EACH DEROGATION AND SANCTION AND DISMISSAL; FOR CERTIFICATION FOR APPEAL/AS FINAL OR FOR INTERLOCUTORY APPEAL) (Filed April 6, 1992)

ORDER DENYING MOTION TO VACATE DISMISSAL AND DEROGATORY WORDS AND SANCTIONS BY THE COURT AND FOR A SPECIFIC FINDINGS OF FACT & CONCLUSIONS OF LAW OF COURT'S BASIS FOR DISMISSAL OF EACH DEROGATION AND SANCTION AND DISMISSAL; FOR CERTIFICATION FOR APPEAL/ AS FINAL OR FOR INTERLOCUTORY APPEAL

The above-entitled motion having been filed on April 1, 1992, and having come on for hearing on Friday, April 3, 1992, before the Honorable E. John McConnell; J. T. Thomas, Esq., appearing Pro Se and on behalf of Plaintiff, David M. Jorgensen, Esq., appearing on behalf of the

Department of Water Supply; and the Court having considered the arguments of counsel, the memoranda and record herein, and being fully advised on the premises;

IT IS HEREBY ORDERED that the motion be denied.

DATED: Wailuku, Maui, Hawaii, Apr 06 1992.

/s/ E. John McConnell
Judge of the
above-entitled Court
[seal]

I hereby certify that a copy hereof
was served upon the following on

Apr 06 1992: J. T. Thomas, Esq.
David M. Jorgensen, Esq.

/s/ Janice Asakura
Clerk

APPENDIX 4

DEPARTMENT OF THE CORPORATION COUNSEL 205

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a:\reiskin1\order5(gpda)

Attorney for Defendants
DEPARTMENT OF WATER SUPPLY/MAUI
COUNTY and COUNTY OF MAUI

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT
STATE OF HAWAII

PAULA REISKIN, Plaintiff, vs. DEPARTMENT OF WATER SUPPLY/ MAUI COUNTY, et. al. Defendants	CIVIL NO. 89-0633(1) (MOTOR VEHICLE TORT) ORDER DENYING PLAINTIFF'S MOTION TO VACATE DISMISSAL AND DEROGATORY WORDS, ETC.; ORDER IMPOSING SANCTIONS PURSUANT TO RULE 11 OF THE HAWAII RULES OF CIVIL PROCEDURE (Filed April 21, 1992)

ORDER DENYING PLAINTIFF'S MOTION TO VACATE DISMISSAL AND DEROGATORY WORDS, ETC.; ORDER IMPOSING SANCTIONS PURSUANT TO RULE 11 OF THE HAWAII RULES OF CIVIL PROCEDURE

The Motion to Vacate Dismissal and Derogatory Words and Sanctions by This Court; And For a Specific Findings of Fact and Conclusions of Law of Court's Basis

for Dismissal of Each Derogation and Sanction and Dismissal; For Certification for Appeal/As Final or For Interlocutory Appeal, filed April 7, 1992, by PAULA REISKIN and J. T. THOMAS, having come on for hearing on April 21, 1992, at 8:30 a.m., before the Honorable E. John McConnell, Judge of the Second Circuit Court, State of Hawaii; Jack L. Thomas a/k/a J. T. Thomas, appearing on behalf of PAULA REISKIN and J. T. THOMAS; Guy P. D. Archer, Deputy Corporation Counsel, appearing on behalf of Defendants DEPARTMENT OF WATER SUPPLY/MAUI COUNTY and COUNTY OF MAUI; and the Court having the benefit of memoranda, exhibits, and argument thereon;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Paul Reiskin and J. T. Thomas' Motion to Vacate Dismissal and Derogatory Words, etc. is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court hereby imposes sanctions against Mr. Thomas individually pursuant to Rule 11 of the Hawaii Rules of Civil Procedure in the amount of $300.00 because the Court finds the aforesaid motion signed by Mr. Thomas is frivolous and was filed for an improper purpose; said $300.00 shall be paid to the County of Maui within ten (10) days of entry of this order.

PAULA REISKIN v. DEPARTMENT OF WATER SUPPLY/MAUI COUNTY, et al.; Civil No. 89-0633(1); ORDER DENYING PLAINTIFF'S MOTION TO VACATE DISMISSAL AND DEROGATORY WORDS, ETC.; ORDER

IMPOSING SANCTIONS PURSUANT TO RULE 11 OF THE HAWAII RULES OF CIVIL PROCEDURE

DATED: Wailuku, Maui, Hawaii, Apr 21, 1992, 1992.

/s/ E. John McConnell
Judge of the
above-entitled Court
[SEAL]

APPROVED AS TO FORM:

/s/ Jack L. Thomas
JACK L. THOMAS
Attorney for Plaintiff
Date: 4-21-92 1:20 P.M.

PAULA REISKIN v. DEPARTMENT OF WATER SUPPLY/ MAUI COUNTY, et al.; Civil No. 89-0633(1); ORDER DENYING PLAINTIFF'S MOTION TO VACATE DISMISSAL AND DEROGATORY WORDS, ETC.; ORDER IMPOSING SANCTIONS PURSUANT TO RULE 11 OF THE HAWAII RULES OF CIVIL PROCEDURE

APPENDIX 5

NOS. 16054 AND 16024

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

PAULA REISKIN, Plaintiff-Appellant, and J. T. THOMAS, ESQ., Pro Se Appellant, vs. DEPARTMENT OF WATER SUPPLY/MAUI COUNTY, E. H. TANNER, COUNTY OF MAUI, a municipal corporation, and JOHN AND JANE DOES 1-100, CORPORATE PARTNERSHIP, BUSINESS AND ASSOCIATE ROES 1-100, Defendants-Appellees.	) CIV. NO. 89-0633(1)) APPEAL FROM (1) ORDER GRANTING DEFENDANTS' SECOND MOTION FOR SANCTION OF DISMISSAL WITH PREJUDICE, FILED JUNE 25, 1991; (2) ORDER DENYING MOTION TO REMOVE DEROGATORY WORDS AND SANCTIONS AGAINST MOVANT BY THIS COURT; OR TO FINE MOVANT AND/OR HOLD HIM IN CONTEMPT IF NOT ALL FACTS AND LAW HAVE NOT CONTRADICTED SAID FALSE DEROGATION AND SANCTION AND FOR A SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW OF COURT'S BASIS FOR EACH DEROGATION AND SANCTION, FILED MARCH 18, 1992; (3) ORDER DENYING MOTION TO VACATE DISMISSAL AND

) DEROGATORY WORDS
) AND SANCTIONS BY
) THIS COURT; AND FOR
) A SPECIFIC FINDINGS
) OF FACT AND CONCLU-
) SIONS OF LAW OF
) COURT'S BASIS FOR DIS-
) MISSAL OF EACH
) DEROGATION AND
) SANCTION AND DIS-
) MISSAL, FILED APRIL 6,
) 1992; AND (4) ORDER
) DENYING PLAINTIFF'S
) MOTION TO VACATE
) DISMISSAL AND
) DEROGATORY WORDS
) ETC., ORDER IMPOSING
) SANCTIONS PURSUANT
) TO RULE 11 OF THE
) HAWAII RULES OF CIVIL
) PROCEDURE, FILED
) APRIL 21, 1992
)
) SECOND CIRCUIT
) COURT
)
)

(Filed July 30, 1993)

MEMORANDUM OPINION

On June 25, 1991, the lower court entered an order (Dismissal Order) dismissing with prejudice Plaintiff-Appellant Paula Reiskin's (Reiskin) complaint for damages for physical and mental injuries allegedly incurred by her as a result of Defendants-Appellees' negligence (hereinafter Defendants-Appellees' Department of Water Supply/Maui County and Maui County will be collectively referred to as Appellees). Reiskin appeals from the

Dismissal Order. Additionally, Reiskin and Pro Se Appellant Jack T. Thomas (Thomas) (hereinafter where appropriate Reiskin and Thomas will be referred to collectively as Appellants), Reiskin's attorney, appeal from orders denying several post-judgment motions (PJM) filed by them.[1/2]

We affirm that portion of the Dismissal Order dismissing Reiskin's claim for damages due to the alleged mental injury. However, we vacate the dismissal of Reiskin's claim for reimbursement of medical expenses allegedly incurred for treatment of her physical injuries and remand that portion of the case to the lower court with instructions. We also affirm the actions of the lower court in denying the PJM.

THE DISMISSAL ORDER

1.

Reiskin filed this action for personal injuries she allegedly received when the automobile she was driving on February 2, 1988, was struck from behind by a truck

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[1] The appeals were consolidated by order of the supreme court on April 29, 1992.

[2] In the answering brief, Appellees challenge appellate jurisdiction on several grounds. These same arguments were made by them in a motion filed in the supreme court on May 21, 1992, to dismiss all of the consolidated appeals. The motion was denied by the supreme court on June 16, 1992. We will not address the issues again. *Azer v. The Courthouse Racquetball Corp.*, ___ Haw. App. ___, 852 P.2d 75 (1993).

owned by Appellees and operated by Defendant-Appellee E. H. Tanner.[3] In a November 1, 1990, pretrial statement, Reiskin asserted that she had fully recovered from her physical injuries; however, she alleged that the collision "triggered" a "dormant" paranoid schizophrenic condition.

On May 23, 1991, Appellees filed a "Second Motion for Sanction of Dismissal with Prejudice" (Second Motion) on the grounds of "the persistent refusal of [Reiskin] to participate in a psychiatric, physical and mental examination as ordered by the Court and the obstructive behavior of counsel for [Reiskin]." The motion was based on Rule 37, Hawaii Rules of Civil Procedure (HRCP) (1980). After a May 28, 1991 hearing, the court took the Second Motion under advisement and stated that it would rule the next day or set an evidentiary hearing.[4] No evidentiary hearing was held, and the Dismissal

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[3] The record indicates that the complaint was dismissed against Defendant-Appellee E. H. Tanner by written stipulation entered on December 13, 1990. We do not know why the caption names him as a defendant-appellee.

[4] On appeal, Appellants assert that both counsel below requested an evidentiary hearing on the Second Motion. The record does not support Appellants' assertion. At the hearing on the Second Motion, Appellees' counsel advised the court that an evidentiary hearing "would be in order, if the court has any reluctance to dismiss the matter." Appellants did not request an evidentiary hearing either in the memorandum in opposition to the Second Motion, which was filed on May 24, 1991, or during the hearing on the motion.

Order was entered dismissing the complaint with prejudice "pursuant to Hawaii Rules of Civil Procedure 37(b)(2)(C)."[5]

The Dismissal Order sets forth a number of "facts of record" that the court "relied on" in arriving at its decision. In essence, the facts of record are that: Reiskin had

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[5] Because dismissal is such a drastic action, some courts have held that an evidentiary hearing is required on a Rule 37(b)(2)(C) motion to dismiss where the nonmoving party raises a question of fact as to any of the factors to be considered in deciding the motion. *Nevada Power Co. v. Fluor Illinois*, 108 Nev. 638, 837 P.2d 1354 (Nev. 1992). In this case, Appellants did not raise any questions of fact, but merely attempted to justify their actions and to show that Appellees were at fault for the failure to complete the examinations.

Moreover, the law is also clear that "[d]ue process does not require that an evidentiary hearing be held in every case prior to imposition of Rule 37(b)(2) sanction[ ] of dismissal[.]" *Robinson v. Higuera*, 157 Ariz. 622, 624, 760 P.2d 622, 624 (Ariz. App. 1988).

> "The requirements of due process are not technical, and no particular form of procedure is necessary for protecting substantial rights. The circumstances of the case dictate the requirements. The integrity of the fact-finding process and the basic fairness of the decision are the principle considerations."

United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 236, 629 P.2d 231, 313 (1980) (quoting *United Nuclear Corp. v. General Atomic Co.*, 93 N.M. 105, 123, 597 P.2d 290, 308 (1979)). The New Mexico Supreme Court noted that the lower court had put the defendant on notice that its conduct in the discovery process was at issue and the court would consider Rule 37 sanctions, including a default judgment, for any further failures to make discovery. *Id.* at 236, 629 P.2d at 312.

In this case, the Dismissal Order points out, and the record affirms, that the court "[w]arned Plaintiff that any failure to fully cooperate with the examinations would result in dismissal."

not complied with a March 22, 1991 order establishing firm dates and times for physical and mental examinations by Dr. Thomas Merrill (Dr. Merrill), a psychologist, and Dr. Byron Eliashof (Dr. Eliashof), a psychiatrist;[6] Appellees filed a motion for sanctions for the non-compliance.[7] On May 16, 1991, after a hearing, the court orally ordered a new date of May 23, 1991, for completing the examinations and directed that Reiskin was to cooperate fully in the examinations;[8] on May 23, 1991, the court held a telephone conference with Appellees' counsel and Thomas, who was in Dr. Eliashoff's office with Reiskin; the court orally ordered that Thomas was not to participate in the examination and was not to appear at Dr. Merrill's office with Reiskin; a notarized letter from Dr. Eliashoff [sic] dated May 24, 1991, accompanying the Second Motion, indicated that after the telephone conference, Thomas "continued to say that [Dr. Eliashof] would be sued" for damaging Reiskin if the examination went forward, and when Dr. Eliashof called Appellees' counsel again, Thomas and Reiskin left Dr. Eliashof's office; a

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[6] The record also shows that the March 22, 1991 order resulted from a record of uncooperative and disruptive activities by Appellants in the discovery procedures that Appellees had theretofore attempted to undertake.

[7] The motion by Appellees to dismiss with prejudice, or in the alternative, to compel compliance with subpoenas and notices of oral depositions; to establish a firm discovery schedule; to continue the trial in order to complete discovery; and for other sanctions was filed on April 26, 1991.

[8] The written order was entered on May 20, 1991. The order also denied Appellees' requests for sanctions and dismissal. Subsequently, the court set a new time for Dr. Merrill's examination but did not change the date.

May 28, 1991 letter from Dr. Merrill indicated that Reiskin had left his office before the examination was completed.[9] The court also found:

* * *

> 9. That [Reiskin's] counsel's arguments concerning notice of his intention to appear at the examinations are disingenuous in light of the entire record in this case.
>
> 10. Throughout this matter the conduct of [Reiskin's] counsel throughout this matter has been inappropriate, belligerent, intimidating as is amply demonstrated in the entire record. [sic]
>
> 11. That there is no lesser sanction that would be appropriate under all the circumstances of this case.
>
> 12. That this sanction was necessary in light of the persistent refusal of [Reiskin] and her counsel to permit psychiatric examination critical to Defendants' due process rights, to prepare a defense to the claims presented by [Reiskin].

2.

Appellants' opening brief is bewildering and poses a plethora of extremely confusing arguments attacking the Dismissal Order[10] which required an unnecessarily painstaking review of the briefs and the record. Our review

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[9] The May 28, 1991 letter was filed after the Second Motion.

[10] The opening brief violates Rule 28(b), Hawaii Rules of Appellate Procedure (1987), in the following respects:

1. The jurisdictional statement contains argument. Rule 28(b)(2).
2. The statement of the case contains argument, recites numerous immaterial facts, and contains

reveals that the dispositive issue is whether the lower court abused its discretion in dismissing Reiskin's claims and denying the PJM. Based on the record, the other arguments raised by Appellants are without merit.

a.

A lower court's imposition of sanctions for abuse of discovery proceedings is reviewed on appeal for abuse of discretion. *Kukui Nuts of Hawaii, Inc. v. R. Baird & Co.*, 6 Haw. App. 431, 726 P.2d 268 (1986). A trial court abuses its discretion whenever it exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party. *SGM Partners v. The*

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numerous statements of fact not supported by citations to the record. Rule 28(b)(3).

3. The statement of points contains argument, fails to quote several of the challenged findings and conclusions of the lower court in their entirety, and does not adequately explain why the challenged findings and conclusions are in error. Rule 28(b)(4).
4. The standard of review contains argument, is difficult to understand, and fails to point out to which alleged errors the various standards apply. Rule 28(b)(5).
5. The questions presented are not set forth in "the most general terms possible." Rule 28(b)(6).
6. The argument does not contain sufficient citations to legal supporting authorities. Rule 28(b)(7).
7. Appendix 38 is a tape of a conversation that is not part of the record on appeal. Rule 28(b)(9).

We have this day entered an order requiring Thomas, as author of the opening brief, to show cause to this court in writing why he should not be sanctioned for the violations.

Profit Co., 8 Haw. App. 86, 793 P.2d 1189, *aff'd in part, rev'd in part*, 71 Haw. 506, 795 P.2d 853 (1990).

Although dismissal of a pending action with prejudice is not favored, *Richardson v. Lane*, 6 Haw. App. 614, 736 P.2d 63 (1987), such dismissals are authorized under Rule 37(b)(2)(B), HRCP, where a party to a proceeding has violated a prior order compelling discovery. *Azer v. Courthouse Racquetball Corp.*, ___ Haw. App. ___, 852 P.2d 75 (1993). Violation of an oral order will support a dismissal of the action. *Henry v. Sneiders*, 490 F.2d 315 (9th Cir.), *cert. denied*, 419 U.S. 832, 95 S. Ct. 55, 42 L. Ed. 2d 57 (1974). Nevertheless, an appellate court will uphold a dismissal with prejudice only where the record clearly shows delay of contumacious conduct and where lesser sanctions would not serve the best interest of justice. *Richardson*.

In *W. H. Shipman, Ltd. v. Hawaiian Holiday Macadamia Nut Co.*, 8 Haw. App. 354, 802 P.2d 1203 (1990), we held that the drastic sanction of dismissal is authorized only in extreme circumstances and is inappropriate when the failure to comply is not due to wilfulness, bad faith, or fault, but rather to the party's inability to comply. In *Shipman* we set forth five factors to be considered and weighed by a trial court in determining whether to dismiss a case as a sanction for discovery abuse. The five factors are: (1) the interest of the public in the expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the party seeking the sanction; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. *Id.* 8 Haw. App. at 362, 802 P.2d at 1207.

Applying the *Shipman* factors to the record in this case, we conclude that the court did not abuse its discretion in dismissing Reiskin's mental injury claim with prejudice but that the court did abuse its discretion in dismissing her claim for medical and orthopedic expenses allegedly incurred on account of physical injuries.

b.

The Mental Injury Claim

The first and second factors weigh heavily in favor of dismissal of Reiskin's mental injury claim. The complaint in this case was filed on December 27, 1989, and trial was scheduled for June 10, 1991. Appellees had made several unsuccessful attempts to have Reiskin examined by the pertinent doctors. In the end, the May 23, 1991 examinations would have allowed only approximately two weeks for Appellees to examine the doctor's reports and conduct any other discovery that the reports may have indicated was necessary.

The lower court record consists of 25 folios made up almost entirely of documents resulting from discovery disputes primarily concerning Appellees' inability to obtain full discovery. Other filings represent Thomas' patently unfounded attempts to have the court impose sanctions on Appellees or their counsel. Those disputes required the expenditure of court time for disposal. Resolution of the case was considerably delayed by Appellants' antics, and the court was hindered in its ability to manage its docket.

The third factor, risk of prejudice to Appellees, weighs clearly in favor of the sanction. As stated, the start of trial was only two weeks away when Appellants thwarted the May 23, 1991 medical examinations. The medical examinations were absolutely essential to preparation of Appellees' defense against Reiskin's claim of psychiatric injury.

The public policy favoring disposition of cases on the merits, the fourth factor, weighs against the sanction. However, we note that Appellants were warned that failure to cooperate in the completion of the medical examinations could result in dismissal. In view of the record in this case, this factor should not be given so much weight as to offset the other factors.

With regard to the fifth factor, the availability of less drastic sanctions, we said in *Shipman* that " '[a]s a general rule the district court must consider less severe alternatives and discuss them if it elects to dismiss.' " *Id.* at 364, 802 P.2d at 1208. The lower court in this case stated that less drastic sanctions would not "be appropriate under all the circumstances of this case," but did not discuss those less drastic sanctions. We do not regard the omission as fatal to the dismissal of Reiskin's mental injury claim.

It does not appear that a continuance of the trial would have assisted in getting Appellants to cooperate in completing the examinations. Likewise, monetary sanctions would not have been effective against Reiskin, whose assets, if any, appear from the record to be very limited. Although the lower court could have refrained from dismissing Reiskin's emotional distress claim and imposed monetary sanctions against Thomas, whose

record of recalcitrance and obstructionism in this case belies his argument that he was willing to have his client examined at any time or place, we believe the court acted appropriately.

c.

The Physical Injury Claim

As we have noted above, in her pretrial statement Reiskin asserted that she had fully recovered from her physical injuries; however, she alleged that her injuries had required two years of treatment at a cost of nearly $13,000. In a hearing on December 13, 1990, regarding, *inter alia*, a schedule for the mental examinations, Appellees' counsel indicated that they might desire to have an orthopedic doctor examine Reiskin for her "back condition." However, Thomas stated that Reiskin had "completely recovered from physical injuries to her neck, back, and limbs from this accident." Thomas also stated that Reiskin was not making any claim for "[r]esiduals"; however, she was claiming $13,000 for "M.D. treatment and orthopedic treatment to her back and neck[.]" Consequently, the court did not order a physical examination of Reiskin.

The failure to complete the mental examinations did not affect Appellees' ability to prepare a defense against the claim for medical expenses due to Reiskin's physical injuries.

THE POSTJUDGMENT MOTIONS

1.

Thomas filed three PJM, which we deem to have been filed under Rule 60(b), HRCP (1980). The first PJM (PJM 1), which was filed by Thomas, *pro se*, on March 9, 1992, sought to have the lower court remove "derogatory words" and sanctions against Thomas from the Dismissal Order. The second and third PJM (PJM 2 and PJM 3) were filed on April 1, 1992, and April 7, 1991, respectively, by Thomas for himself and for Reiskin and requested the same relief as PJM 1. All three PJM were heard and denied separately.

2.

Rule 60(b), HRCP motions are addressed to the discretion of the trial court, 11 C. Wright and A. Miller, *Federal Practice and Procedure: Civil* § 2857, at 157 (1973) (hereafter Wright and Miller), and are utilized to request the court to relieve a party from a judgment on the grounds of mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or fraud or misrepresentation. We find no abuse of discretion.

3.

Essentially, all three PJM are a rehash of the arguments made by Thomas at the hearing on the Second Motion: that Appellees and not Appellants were at fault

in the failure to complete the examinations.[11] However, Appellants argue on appeal that exhibits attached to the PJM are newly discovered evidence on the basis of which the PJM should have been granted. We disagree.

PJM 1 and 2 had attached to them a June 3, 1991 affidavit from one Gabriel Gandall (Gandall) who averred that he was in Thomas' office on May 31, 1992, and overheard a "speaker phone" conversation between Thomas and Dr. Merrill regarding an "interview" Dr. Merrill had with Reiskin a "few days before." The purport of the conversation, according to Gandall, was that Reiskin did not violate the court order when he left Dr. Merrill's office on May 23, 1991. Additionally, attached to PJM 3 was a copy of a March 31, 1992 letter from Appellees' counsel to the State Office of Disciplinary Counsel (ODC) replying to a March 30, 1992 letter to Appellees' counsel from the ODC. The March 31, 1992 letter indicates that the ODC was investigating a complaint placed before them regarding Thomas' actions in this case. *Id.*

a.

While a party may be relieved from a judgment on the basis of newly discovered evidence, the evidence must have preexisted the judgment and not have been discoverable with due diligence. Wright and Miller,

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[11] In the order denying PJM 3, the lower court ordered Thomas, individually to pay $300 to Appellees as a sanction under Rule 11, HRCP (1990), on the basis that PJM 3 was "frivolous and was filed for an improper purpose[.]" The record supports the lower court and the sanction was not an abuse of discretion.

§ 2859, at 181-86. Assuming that the conversation that Gandall allegedly overheard took place before the May 28, 1991 hearing, Gandall's knowledge of it was clearly discoverable by Appellants with due diligence. Consequently, it does not qualify as newly discovered evidence.

b.

Appellants also argue that Appellees' counsel's letter to the ODC was newly discovered evidence of fraud on Appellees' counsel's part. Appellants assert that the letter was proof that Appellees' counsel was using the discovery process to coerce Reiskin into admitting that she had fraudulently obtained payment of certain benefits from her automobile insurance carrier. Appellants contend that Appellees' counsel's denial during the course of the proceedings that his actions in this case were so motivated, worked a fraud on the court that contributed toward the Dismissal Order. The argument is utterly without merit.

First, the letter was not newly discovered evidence within the meaning of Rule 60(b). Second, the letter does not support Appellants' argument that Appellees' counsel was acting in furtherance of an improper motive. Finally, even if Appellants' interpretation of the letter is correct, the letter reflects only on the credibility of Appellees' counsel and was not likely to change the result of the proceeding below. Consequently, the letter does not support the granting of any of the PJM. Wright and Miller, § 2859, at 181-86.

CONCLUSION

Accordingly, we affirm the dismissal of Reiskin's mental injury claim with prejudice. However, we vacate the dismissal of Reiskin's claim for medical and orthopedic expenses resulting from her physical injuries. This matter is remanded with instructions to the lower court to allow Reiskin to litigate her alleged medical and orthopedic expenses if she chooses to do so. We also affirm the actions of the lower court in denying the PJM.

DATED: Honolulu, Hawaii, July 30, 1993.

J. T. Thomas
on the brief for
Appellants.

Guy P. D. Archer,
Deputy Corporation Counsel,
County of Maui, on the brief
for Defendants-Appellees.

/s/ James S. Burns

/s/ Walter M. Heen

/s/ Corinne K.A. Watanabe

APPENDIX 6

NO. 16054

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

PAULA REISKIN, Plaintiff-Appellant, and J. T. THOMAS, ESQ., Pro Se Appellant, vs. DEPARTMENT OF WATER SUPPLY/MAUI COUNTY, E. H. TANNER, COUNTY OF MAUI, a municipal corporation, and JOHN AND JANE DOES 1-100, CORPORATE PARTNERSHIP, BUSINESS AND ASSOCIATE ROES 1-100, Defendants-Appellees.	CIV. NO. 89-0633(1)

ORDER IMPOSING SANCTIONS
FOR VIOLATION OF RULE 28(b), HRAP
(Filed July 30, 1993)

The opinion of this court, filed this day points out that the opening brief violates Rule 28(b), Hawaii Rules of Appellate Procedure (HRAP) (1987), in several respects.

Therefore, IT IS HEREBY ORDERED that *pro se* Appellant J. T. Thomas (Thomas), as author of the opening brief for himself and Plaintiff-Appellant Paula Reiskin, shall show cause in this court why sanctions should not be imposed against him for those violations. Thomas' response, consisting of not more than ten pages, shall be filed within ten days of this order. Failure to respond or to show cause to the satisfaction of this court will result in sanctions, by fine or otherwise. Rule 51, HRAP (1985).

DATED: Honolulu, Hawaii, July 30, 1993.

/s/ James S. Burns

/s/ Walter M. Heen

/s/ Corinne K.A. Watanabe

(Seal)

APPENDIX 7

NO. 16054

IN THE SUPREME COURT OF THE STATE OF HAWAII

PAULA REISKIN, Plaintiff-Appellant, J. T. THOMAS, Petitioner-Appellant, vs. DEPARTMENT OF WATER SUPPLY/MAUI COUNTY, COUNTY OF MAUI, a municipal corporation, JOHN and JANE DOES 1-100, CORPORATE; PARTNERSHIP, BUSINESS and ASSOCIATE DOES 1-100, Defendants-Appellees.	CIV. NO. 89-0633

ORDER
(Filed Sep. 14, 1993)

Petitioners Paula Reiskin's and J. T. Thomas's Application for Writ of Certiorari filed on August 9, 1993 is hereby denied.

DATED: Honolulu, Hawaii, September 14, 1993.

FOR THE COURT:

/s/ Ronald T. Y. Moon
Chief Justice

(Seal)

J. T. Thomas
for the writ

APPENDIX 8

NO. 16054

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

PAULA REISKIN, Plaintiff-Appellant, and J. T. THOMAS, ESQ., Pro Se Appellant, vs. DEPARTMENT OF WATER SUPPLY/MAUI COUNTY, E. H. TANNER, COUNTY OF MAUI, a municipal corporation, and JOHN AND JANE DOES 1-100, CORPORATE PARTNERSHIP, BUSINESS AND ASSOCIATE ROES 1-100, Defendants-Appellees.	CIV. NO. 89-0633(1)

ORDER IMPOSING SANCTIONS FOR VIOLATION OF RULE 28(b), HAWAII RULES OF APPELLATE PROCEDURE

(Filed Oct. 6, 1993)
NO. 16054

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

PAULA REISKIN, Plaintiff-Appellant, and J. T. THOMAS, ESQ., Pro Se Appellant, vs. DEPARTMENT OF WATER SUPPLY/MAUI COUNTY, E. H. TANNER, COUNTY OF MAUI, a municipal corporation, and JOHN AND JANE DOES 1-100, CORPORATE PARTNERSHIP, BUSINESS AND ASSOCIATE ROES 1-100, Defendants-Appellees.	)	CIV. NO. 89-0633(1)

ORDER IMPOSING SANCTIONS FOR VIOLATION OF RULE 28(b), HAWAII RULES OF APPELLATE PROCEDURE

On July 30, 1993, this court ordered J. T. Thomas, Esq. (Thomas), as *Pro Se* Appellant, attorney for Plaintiff-Appellant Paula Reiskin, and as author of the opening brief in this case, to show cause in writing why sanctions should not be imposed on him for filing an opening brief that violated Rule 28(b), Hawaii Rules of Appellate Procedure (HRAP) (1987), in several respects. The violations are listed in footnote 10 (footnote 10) on pages 6 and 7 of

this court's memorandum opinion entered on July 30, 1993.

In Thomas' August 9, 1993 response he claims that because the case encompasses two appeals; the record contains some 8,000 pages; the lower court failed to specify the reasons for dismissing the complaint in this case; and the supreme court failed to grant his motion to file an opening brief that exceeded 35 pages, he was forced "to cover a myriad of possible untold reasons for the dismissal[, and] every possible issue the lower court could have been referring to."

In addition to the above explanation, Thomas' response includes a portion of the transcript of a May 29, 1991 hearing below. The purpose of the inclusion is to rebut this court's statement in item no. 7 of footnote 10 that the copy of the tape that was attached to the opening brief as an appendix was not a part of the record on appeal. The inclusion quotes the lower court as saying, "It's [the tape] is in the record." Notwithstanding the lower court's statement, the index to the record on appeal does not indicate the tape is part of the record, and the opening brief did not indicate where in the record the tape was introduced in evidence or could be found. The fact that the tape may be somewhere in the record on appeal did not justify attaching a copy of the tape to the opening brief without referring this court to where the tape could be found *in the record.*

We reject Thomas' argument in the response that Rule 28 violates the due process clause of the Fourteenth Amendment of the United States Constitution; his correction to paragraph 1 of page 6 of his response filed on

August 16, 1993; and his request for extension of time to respond to the July 30, 1993 order, he filed on August 16, 1993.

We deem Thomas' explanation to be insufficient justification for the Rule 28(b) violates. Therefore, IT IS HEREBY ORDERED, that Thomas pay the sum of $150 to Hawaii Lawyers Care as a sanction for those violations. Rule 51, HRAP. IT IS FURTHER ORDERED that Thomas shall file with the clerk of this court within 20 days of this order a receipt from Hawaii Lawyers Care showing such payment.

DATED: Honolulu, Hawaii, October 6, 1993.

/s/ James S. Burns

/s/ Walter M. Heen

/s/ Corinne K.A. Watanabe

(Seal)

APPENDIX 9

NO. 16054

IN THE SUPREME COURT OF THE STATE OF HAWAII

PAULA REISKIN, Plaintiff-Appellant, J. T. THOMAS, Petitioner-Appellant, vs. DEPARTMENT OF WATER SUPPLY/MAUI COUNTY, COUNTY OF MAUI, a municipal corporation, JOHN and JANE DOES 1-100, CORPORATE; PARTNERSHIP, BUSINESS and ASSOCIATE DOES 1-100, Defendants-Appellees.	CIV. NO. 89-0633

ORDER

(Filed Oct. 22, 1993)

Petitioners Paula Reiskin's and J. T. Thomas's Application for Writ of Certiorari filed on October 12, 1993 is hereby denied.

DATED: Honolulu, Hawaii, October 22, 1993.

FOR THE COURT:

/s/ Ronald T. Y. Moon
Chief Justice

(Seal)

J. T. Thomas
for the writ

APPENDIX 10

NO. 16054

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

PAULA REISKIN, Plaintiff-Appellant, and J. T. THOMAS, ESQ., Pro Se Appellant, vs. DEPARTMENT OF WATER SUPPLY/MAUI COUNTY, E. H. TANNER, COUNTY OF MAUI, a municipal corporation, and JOHN AND JANE DOES 1-100, CORPORATE PARTNERSHIP, BUSINESS AND ASSOCIATE ROES 1-100, Defendants-Appellees.	)	CIV. NO. 89-0633(1)

NOTICE AND JUDGMENT ON APPEAL
CERTIFICATE OF SERVICE
(Filed Dec. 21, 1993)

DEPARTMENT OF THE CORPORATION COUNSEL 205

GUY A. HAYWOOD 1575
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GUY P. D. ARCHER 1430
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Telephone No. 243-7740

NO. 16054

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

PAULA REISKIN, Plaintiff-Appellant, and J. T. THOMAS, ESQ., Pro Se Appellant, vs. DEPARTMENT OF WATER SUPPLY/MAUI COUNTY, E. H. TANNER, COUNTY OF MAUI, a municipal corporation, and JOHN AND JANE DOES 1-100, CORPORATE PARTNERSHIP, BUSINESS AND ASSOCIATE ROES 1-100, Defendants-Appellees.	CIV. NO. 89-0633(1)

NOTICE AND JUDGMENT ON APPEAL

TO: THE HONORABLE PRESIDING JUDGE OF THE SECOND CIRCUIT, STATE OF HAWAII

PLEASE TAKE NOTICE the following Judgment on Appeal is entered this day by the Intermediate Court of Appeals of the State of Hawaii:

Pursuant to the memorandum opinion of the Intermediate Court of Appeals entered on July 30, 1993; the orders of the Supreme Court entered on September 14,

1993 and October 22, 1993, denying appellants' applications for writ of certiorari; The order of the Second Circuit Court, State of Hawaii, entered on June 25, 1991, dismissing Plaintiff-Appellant Paula Reiskin's complaint is affirmed as to the dismissal of her mental injury claim with prejudice, but is vacated and remanded as to her claim for medical and orthopedic expenses resulting from her physical injuries. The lower court is instructed to allow Plaintiff-Appellant Paula Reiskin to litigate her alleged medical and orthopedic expenses if she chooses to do so. The lower court's actions in denying appellants' post judgment motions is also affirmed.

DATED: Honolulu, Hawaii, DEC 21 1993.

BY THE COURT:

L. Nakagawa
Clerk

APPROVED:

Walter M. Heen
JUDGE

(Seal)

PAULA REISKIN AND J. T. THOMAS, ESQ. vs. DEPARTMENT OF WATER SUPPLY/MAUI COUNTY, E. H. TANNER, COUNTY OF MAUI, et al.; SUPREME COURT NO. 16054; CIVIL NO. 89-0633(1); IN THE INTERMEDIATE COURT OF APPEALS; NOTICE AND JUDGMENT ON APPEAL; CERTIFICATE OF SERVICE

APPENDIX 11

Amendments to the United States Constitution

[ARTICLE I.-1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[ARTICLE V.-1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

[ARTICLE VI.-1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

[ARTICLE XIV.-1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX 12

Hawaii Rules of Civil Procedure

Rule 6. TIME.

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday or a holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation. As used in this rule, "holiday" includes any day designated as such pursuant to section 8-1 of the Hawaii Revised Statutes.

(d) For Motions; Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof, shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than the day preceding the hearing, unless the court permits them to be served at some other time.

Rule 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS.

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Examining Physician.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination, shall be entitled upon request to receive from the party against whom the order is made a like report of any examination previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just,

and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.

Rule 11. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS. Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the

amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 26. GENERAL PROVISIONS GOVERNING DISCOVERY.

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called an expert witness at trial, the subject matter on which has expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

APPENDIX 13

Hawaii Rules of Civil Procedure

Rule 37. FAILURE TO MAKE DISCOVERY: SANCTIONS.

(b) Failure to Comply With Order.

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

Rule 59. NEW TRIALS; AMENDMENT OF JUDGMENTS.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 60. RELIEF FROM JUDGMENT OR ORDER.

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the supreme court, and thereafter while the

appeal is pending may be so corrected with leave of the supreme court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

Hawaii Rules of Evidence

Rule 201 Judicial notice of adjudicative facts. (a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

APPENDIX 14

Hawaii Rules of Appellate Procedure

Rule 28. BRIEFS.

(2) A statement showing the grounds on which the jurisdiction of the court has been invoked. It shall include a showing that the appeal is timely by references to the record with dates. In a criminal case it shall indicate the nature of the offense and the statute under which the defendant was convicted, the sentence imposed, and whether the defendant has been released on bail or on his own recognizance.

(3) A concise statement of the case, containing the facts material to consideration of the questions and points presented, with record references supporting each statement of fact or mention of trial proceedings. In presenting those material facts all supporting and contradictory evidence shall be presented in summary fashion and with appropriate record references. There shall be appended to the brief a copy of the findings of fact and conclusions of law, or opinion or decision, if any, unless otherwise ordered by the court.

(4) A concise statement of the points on which appellant intends to rely, set forth in separate, numbered paragraphs. Each point shall refer to the alleged error committed by the court or agency upon which appellant intends to rely. The point shall show where in the record the alleged error occurred and where it was objected to and, where applicable, the following:

(C) When the point involves findings or conclusions of the court below, those urged as error shall be quoted in

their entirety and there shall be included a statement explaining why the findings of fact or conclusions of law are alleged to be erroneous.

(5) A brief separate section entitled "Standard of Review," setting forth the applicable standard or standards of review to be applied in reviewing the respective orders or decisions of the trial court or agency alleged to be erroneous.

(6) A short and concise statement of the question or questions presented for decision by the points specified under (b)(4) of this rule, set forth in the most general terms possible. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Questions not presented in accordance with this paragraph will be disregarded, except that the court, at its option, may notice a plain error not presented.

(7) The argument, exhibiting clearly the points of fact and of law being presented, citing the authorities relied upon. The argument may be preceded by a concise summary.

(9) Parts of the record material to the questions presented may be included in the appendix. Anything that is not part of the record shall not be appended to the brief.

(c) **Answering Brief.** Within 40 days after service of appellant's opening brief, the appellee shall file an answering brief. The brief shall be of like character as that required of the appellant except that no statement of points shall be required, and no other section is required

unless the section presented by the appellant is controverted. The answering brief shall contain a counterstatement of each section except points, unless the appellee is satisfied with the section included in the appellant's brief.

Hawaii Revised Statutes

PART I. APPEALS IN CIVIL ACTIONS AND PROCEEDINGS

§ 641-1 Appeals as of right or interlocutory, civil matters. (a) Appeals shall be allowed in civil matters from all final judgments, orders, or decrees of circuit and district courts and the land court, to the supreme court or to the intermediate appellate court, except as otherwise provided by law and subject to the authority of the intermediate appellate court to certify reassignment of a matter directly to the supreme court and subject to the authority of the supreme court to reassign a matter to itself from the intermediate appellate court.

APPENDIX 15

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

PAULA REISKIN Plaintiff, vs. DEPARTMENT OF WATER SUPPLY, Defendant.	CIVIL NO. 89-0633(1) AFFIDAVIT OF GABRIEL GANDALL

AFFIDAVIT OF GABRIEL GANDALL

STATE OF HAWAII)
) SS:
COUNTY OF MAUI)

Gabriel Gandall, being first duly sworn on oath, deposes and says:

1. That he was present when J.T. Thomas called on the speaker phone a man who identified himself as Doctor Tom Merrill on May 31, 1991.

2. That said Doctor Merrill said he had an interview with a Paula Reiskin a few days before and asked her three question which she answered properly, and then he left the room.

3. The said Doctor Merrill said in this conversation that no one told said Reiskin to stay after those three questions which she answered properly, and that he left the room, without anyone telling her to stay.

4. That said Reiskin answered the written and oral questions given her totally, while at said Merrill's office whenever she was there, according to Doctor Merrill in said conversation.

5. That Doctor Merrill said in this conversation at the last exam he had another patient set for about 1:45 p.m. and could not continue with Paula Reiskin at that said exam a few days before.

Further Affiant Sayeth Naught.

/s/ Gabriel Gandall
GABRIEL GANDALL

Subscribed and sworn to before me
this 3rd day of June, 1991

(Seal)

/s/ Donna Thomas
Notary Public, Second Judicial
Circuit, State of Hawaii

My commission expires: 9-10-93